

ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20010306

State of North Dakota,
Appellee,

vs.

Michael Duane Taylor,
Defendant/Appellant.

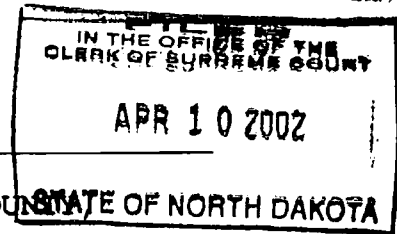
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SUPREME COURT

APR 11 '02

Supreme Court No. 20010306

District Court No. 01-K-529



APPEAL FROM THE DISTRICT COURT OF WARD COUNTY
NORTHWEST JUDICIAL DISTRICT
BEFORE THE HON. GARY A. HOLUM

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS.

Michael Taylor (hereinafter "Defendant") was charged on an Amended Information with Illegal Possession of a Controlled Substance With Intent to Deliver (Marijuana), Possession of Drug Related Paraphernalia, and Fleeing or Attempting to Elude a Police Officer in violation of N.D.C.C. 19-03.1-23 and 39-10-71. Said offenses are alleged to have occurred on March 19, 2001. (App. 4)

A trial by jury of 12 persons was held Sept. 25th through Sept. 27, 2001, in Minot, ND. The Honorable Gary A. Holum presided over the jury trial. Paul Probst represented the Defendant before and during the trial. Prior to the jury trial the Defendant moved to suppress the evidence obtained as a result of the execution of the search warrant. (App. 1, Entry 24-28) No hearing was requested. The State responded in opposition to the Motion to Suppress. (App. 1, Entry 30-31) Judge Holum denied the Defendant's Motion to Suppress. (App. 6-7)

At trial, the State moved to dismiss the Possession of Drug Related Paraphernalia charge prior to closing its case in chief. (Tr. Trans pg. 270) The Defendant was found guilty on the remaining two counts following the jury.

On Dec. 4th, 2001, the Judge Holum sentenced the Defendant to a term of 10 years on the class B felony charge of Illegal

Possession of a Controlled Substance With Intent to Deliver (Marijuana). (App. 8) The Defendant also received a concurrent 1 year sentence on the class A misdemeanor charge of Fleeing or Attempting to Elude a Police Officer. (App. 9)

The Defendant filed a timely Notice of Appeal of "the District Court's Order of December 4, 2001." (App. 16) On or about December 6, 2001, Attorney Kelly Dillon of the Slorby Law Firm was appointed to represent the Defendant for this appeal. (App. 3; Entry 204) The Defendant's appeal is based on the district judge's denial of the Defendant's pre-trial motion to suppress, arguing insufficient probable cause for the search warrant. The State disagrees.

B. FACTS.

On June 4, 2000, the Defendant was arrested in South Dakota for felony possession of Marijuana for 1 to 10 pounds and he subsequently failed to make an appearance in that case. A warrant was issued for his arrest. Said arrest warrant was outstanding on March 19, 2001, when ND BCI Special Agent Michael Marchus submitted a five page Affidavit in Support of an Application for a Search Warrant of the 1997 black Honda Civic with ND license # GHG8999 said to be that of the Defendant and of A17 Jefferson Trailer Court, Minot, ND a place where the Defendant was said to hang out. The search warrant sought evidence of the presence of marijuana, pay/owe sheets, evidence of occupancy, and currency that can be

reasonably related to dealing in controlled substances and drug related paraphernalia. (App. 13 and 15) At the end of the affidavit, Marchus noted that law enforcement, based on the active warrant from South Dakota against the Defendant, had just tried to stop the vehicle the Defendant was in when the application for the warrant was being prepared. The vehicle had just been abandoned as the Defendant and another fled the vehicle. Paraphernalia and a number of small packages of marijuana were found in said abandoned vehicle which was consistent with marijuana prepared for sale rather than personal use. (App. 13-14)

In addition to the June 4, 2000 arrest of the Defendant and the active warrant for his arrest and finding of marijuana and paraphernalia in the Defendant's vehicle, other portions of Marchus' March 19, 2001, Affidavit in Support of the Application for Search Warrant to establish probable cause to search said premises included:

[1] That the March 7, 2001, statement from Captain Willie Graham of the Ward County Sheriff's Department to the Ward County Drug Task Force (WCDF) that Roger Enget told him in a transport to the correctional facility in Jamestown, North Dakota that a blond haired 27 year old white guy who is 5'8" to 5'9" in height and weighs between 175 to 180 lbs and drives a black 1997 Honda makes frequent trips to Colorado to bring multiple pounds of marijuana to Minot. Enget also told Graham

that the person usually stays at the Ho-Hum motel and that person supplies drugs to Dusty Sheehan, Nathan Dosch and Brandon Peterson. WCDTF intelligence reports indicate the three individuals are known drug users and may possibly be drug dealers (App. 10);

[2] That on March 15, 2001, after being stopped by the Highway Patrol for an equipment violation, KC Peters told WCDTF officers that Michael Taylor was a big supplier of marijuana to the Minot area and that Taylor gets his dope from the Mexican Mafia in Colorado. Taylor was said to use the same type of vehicle as described by Enget. Peters said the vehicle was stolen out of Colorado and registered in North Dakota with a salvage title. Motor Vehicles records showed that Taylor has a black 1997 Honda registered to him and his mother and said Honda has a salvage title.

Peters said that Taylor usually brings back 40 to 50 pounds of marijuana per trip and that Taylor was on a run wherein he should be coming back soon, possibly the weekend of March 16th through the 18th. Peters said Taylor hangs out at A17 Jefferson Trailer Park (hereinafter A17 Jefferson) with Chris Warren Olson. Peters identified Chris Olson from a photograph shown to him by law enforcement as the Olson who Taylor hangs out with at A17 Jefferson (App. 10-11);

[3] The Defendant showed up in the location that Peters said he would be at. Said location was the Olson residence at

A17 Jefferson (App. 11-12);

[4] The Defendant showed up at the location within the probable time frame alluded to by Peters. Peters indicated the Defendant should be coming back, possibly the weekend of March 16th through March 18th. The Defendant's car was spotted at A17 Jefferson "[E]arly on March 19, 2001," by Minot Police patrol officers. Surveillance was then set up at 9:30 am that morning at A17 Jefferson (App. 11-12);

[5] That at approximately 1:30 pm on March 19th, Dorothy Walter, an identified felony drug offense probationer, was observed at the Olson residence and she was there for a short period of time (App. 12);

[6] Dorothy Walter was followed from the Olson residence and was observed to have stopped at Corner Express Amoco where she met the driver of another vehicle. Walter got into the other car for a short period of time, got back into her vehicle and left. Officers thought they saw a drug deal. A probation search of Walter was ordered by Walter's probation officer. Walter was subject to a search clause since she was on probation for felony drug offenses. Walter was found to possess paraphernalia and a small amount of marijuana (Id.);

[7] The Defendant stayed at A17 Jefferson after Dorothy Walter left. Law enforcement saw him leave the residence and get a full looking white garbage type bag from a black suitcase in the trunk of his black Honda and took the items

into A17 Jefferson (App. 13);

[8] Then Dustin Sheehan, a known drug user, stopped at the Olson residence for a short period of time and left. But he left after the Defendant and two others came out of Olson's residence and looked at the vehicle Sheehan drove (Id.);

[9] The Magistrate was told of the conflicting information that law enforcement had on the Defendant's vehicle, along with how the matter was addressed. In an unconfirmed intelligence report taken by Loren Headrick, prior to the Enget-Peters reports, the Defendant was reported to be driving a teal colored vehicle which was supposedly stolen from Colorado and registered in North Dakota. But for the stolen aspect, the information from Peters on the Defendant's vehicle had been confirmed. The Magistrate was informed not only of the conflicting information, but also that Enget and Peters gave similar information on the vehicle for the state it was registered in. Motor Vehicle records confirmed the black 1997 Honda Civic was registered in North Dakota and that a salvage title was issued (App. 10-11 and 13);

[10] That the Defendant was observed leaving the Olson residence on March 19, 2001 as a passenger in his vehicle which matched the description by Peters and Enget. Law enforcement tried to make a traffic stop based on the South Dakota warrant and the two occupants (of which included the Defendant) abandoned the vehicle and fled on foot. The

abandoned car was searched by law enforcement and, as previously mentioned, marijuana, thought to have been prepared for sale, was found as was paraphernalia (App. 13); and,

[11] Nathan Dosch, who Roger Enget previously named as one of the Defendant's alleged customers, was the other occupant and he was arrested subsequent to his fleeing from the vehicle. (App., 10 and 13-14).

After the search warrant was issued, a search of the Olson residence was undertaken on March 19, 2001, and some alleged 18 pounds of marijuana was found in the suitcase that the Defendant had previously been seen carrying into the Olson residence. Said suitcase was in a separate room that also contained a scale and evidence of occupancy by the Defendant. Marchus later had contact with the Defendant in the Ward County Jail. After being given his Miranda warning, the Defendant admitted to having brought some 20 pounds to Minot from Colorado. The Defendant claimed to have sold some 2 pounds prior to being arrested.

ISSUE

WHETHER THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT ESTABLISHED SUFFICIENT PROBABLE CAUSE TO SEARCH A17 JEFFERSON TRAILER PARK FOR EVIDENCE OF POSSESSION OF MARIJUANA WITH INTENT TO DELIVER.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS SINCE THE AFFIDAVIT IN SUPPORT OF THE WARRANT WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE.

For a search warrant to be issued, the Fourth Amendment of the U.S. Constitution and Article I, Section 8 of the North Dakota Constitution required that there be probable cause. State v. Wamre, 1999 ND 164 ¶5, 599 NW2d 268 citations omitted. Whether probable cause exists to issue a search warrant is a question of law. State v. Rangeloff, 1998 ND 135, ¶16, 580 NW2d 593.

The totality of the circumstances test from in Illinois v. Gates, 462 US 213 (1983) is utilized to help determine or analyze whether the information before the magistrate is sufficient to establish probable cause. State v. Tester, 1999 ND 60, ¶17, 592 NW2d 515.

In State v. Duchene, 2001 ND 66, ¶12, 624 NW2d 668, this Court declared "[t]he magistrate to make a practical, common sense decision on whether probable cause exists to search that particular place." State v. Wamre, 1999 ND 164 ¶5, 599 NW2d 268. [It also stated that it will] ... defer to the magistrate's findings of fact if there is a substantial basis for the probable cause conclusion. State v. Thieling, 2000 ND 106, ¶8, 611 NW2d 861." State v. Duchene, 2001 ND 66, ¶12, 624

NW2d 668. This Court resolves "doubt about the sufficiency of an affidavit in support of a request for a search warrant in favor of sustaining the search." Wamre, at ¶7.

This Court detailed in the Duchene decision that "[P]robable cause to search does not demand the same standard of proof to establish guilt at trial." Wamre, 1999 ND 164, ¶6, 599 NW2d 268. 'Probable cause to search exists 'if the facts and circumstances relied on by the magistrate would warrant a person of reasonable caution to believe the contraband or evidence sought probably will be found in the place to be searched.' ' Thieling, 2000 ND 106, ¶7, 611 NW2d 861 (citation omitted) All the information presented to establish probable cause should be considered together, rather than analyzed in a piecemeal fashion. State v. Darmon, 1998 ND 71, ¶6, 575 NW2d 912. 'Circumstantial evidence may alone establish probable cause to support a search warrant.' Wamre, 1999 ND 164, ¶6, 599 NW2d 268. Information causing mere suspicion and warranting further investigation, however, is not probable cause. Thieling, 2000 ND 106, ¶8, 611 NW2d 861." State v. Duchene, at ¶13.

The Gates totality of the circumstance test provides for an entire Affidavit in Application of Support for a Search Warrant to be considered and the veracity or reliability of an informant could be supported by other factors. These factors include such things as corroboration by another informant and

independent police corroboration of the informant's information.

In this case, Enget and Peters separately corroborate information provided by the other (App., 10-11), along with the fact that the Defendant's actions corroborated much of the information given by Peters. (Id., pg 11 -12) Also, ND BCI Agent Marchus corroborated almost every detail of the information provided by Peters, including the fact that the Defendant drove a 1997 black Honda and that it was registered in North Dakota and was a salvage vehicle originally out of Colorado. (Id.) "Whereⁿ law enforcement officers, ^{have verified part of an informant's information by independent investigation} through independent, ^e this corroboration lends credence to remaining unverified information." State v. Birk, 484 NW2d 834, 837 (ND 1992) In this case, the Magistrate was informed through the Affidavit that the Defendant did have a 1997 black Honda Civic, that he did appear at the location that Peters indicated he hung out at and did so within the time frame indicated by Peters. (Id.)

The Defendant's Motion to Suppress and the Appellant's Brief all fail to discuss the fact that the Defendant had been arrested in South Dakota some 10 months earlier for allegedly possessing a large amount of marijuana and that there was an existing warrant out for his failure to appear on said charge. "A suspect's reputation can support a determination of probable cause only when used in conjunction with other

evidence.” State v. Hegge, 1997 ND 175, ¶23, 568 NW2d 741. The State asserts that the Defendant’s South Dakota felony drug charge and the warrant for his arrest, in conjunction with the other evidence before the Magistrate, helps to corroborate the Defendant’s connections to Colorado and large amounts of marijuana activity and thereby helps to establish probable cause for the issuance of the search warrant in this case.

In further support of upholding the Affidavit in Support of the Application for a Search Warrant, the State asserts that Nathan Dosch, who Enget claimed was one of the Defendant’s marijuana customers (App., 10), was in the Defendant’s vehicle and abandoned it, as did the Defendant, and marijuana, packaged in a manner consistent with Intent to Deliver, was found in it. (Id., pg 13-14)

Enget also claimed that the 27 year old white guy who drives a black 1997 Honda makes frequent trips to Colorado and brings back multiple pounds of marijuana.(App. 10) This information was corroborated by Peters who told the WCDTF on March 15, 2001 that Michael Taylor drives a 1997 black Honda Civic. Peters said that Taylor usually brings back 40 to 50 pounds and that he was on a run now and should be coming back soon, possibly the weekend of March 16th through the 18th. Peters claimed the black 1997 Honda was stolen out of Colorado and was registered in North Dakota with a salvage title. Motor Vehicle indicated the Defendant’s black 1997 Honda was

registered to him and his mother and that it had a salvage title. The "stolen" aspect of the vehicle was not verified, nor was the Defendant usually staying at the Ho-Hum motel, as claimed by Enget. (App. 10-11)

Peters claimed the Defendant hung out at A17 Jefferson with Chris Olson. Peters was able to identify Chris Olson from a photograph as the person the Defendant stays with at A17 Jefferson. The Defendant's black Honda was spotted early on the morning of March 19th, and surveillance was then set up at approximately 9:30 am on said morning. (App. 10-11)

Also, Dorthy Walter, a convicted felon of drug related offenses who was on probation, was found to have marijuana on her shortly after she left the Olson residence at A17 Jefferson. (App. 12)

It is well recognized that the "[T]he likelihood that the evidence sought is still in place depends on a number of variables including the nature of the crime, of the criminal, of the thing to be seized, and of the place to be searched." State v. Ringquist, 433 NW2d 207, 213 (ND 1988) Drug trafficking is inherently deemed to be a protracted and continuous activity. Id., at 214. In this case, the Defendant was said to have been on a multi-pound marijuana run from Colorado when he returned to Minot and common sense indicates that would mean he brought back a sizeable amount of marijuana when the Defendant was observed back in the Minot area on the

early morning of March 19, 2001, and surveillance was set up at 9:30 am. The Defendant brought the suitcase and the garbage type bag into A17 Jefferson and he was not seen taking either item back out. There were not that many people at A17 Jefferson when the Defendant was there. Also, no third parties were reported seen taking either the suitcase or the white garbage type bag out after the Defendant departed from A17 Jefferson. Thus, the State asserts that it was probable that at the time of the issuance of the search warrant that the suspected marijuana from the suitcase was still on the property.

The Defendant argues the case of State v. Thieling, is similar to this case and supports his position that there was insufficient evidence for probable cause in this case. (Appellant's Br. 9) In support of his position, the Defendant asserted the Thieling case provides authority for ruling that there was not enough evidence to establish probable cause in this case when there is evidence only of just association with others who have prior drug offenses, the point of there being no evidence of criminal activity within the residence, that mere suspicion of people visiting a premises are connected with criminal activity, and physical evidence in the form of baggies and small pieces of tin foil having a lawful purpose. (Id.)

In addressing the Defendant's argument, the State

requests the Court review the entire Affidavit in Support of the Application for Search Warrant rather than portions selected by the Defendant. Darmon, at ¶6. Additionally, the State asserts that the Defendant's argument is without merit when applied to the facts of this case.

This case is clearly distinguishable from the Thieling case in not only that marijuana and paraphernalia were found in the Defendant's vehicle prior to the issuance of the search warrant (App., 13-14) and that the Defendant abandoned the vehicle when chased by law enforcement, but also that the small packages of marijuana were consistent with marijuana prepared for sale ^{rather than} for personal use. (Id.) The Defendant was in his marijuana carrying vehicle when it went from A17 Jefferson to where the Defendant abandoned it. The Defendant was previously seen to have taken a suitcase and plastic bag from his vehicle into the Olson residence. The suitcase was never seen leaving A17 Jefferson prior to the issuance of the search warrant.

Although the State feels that the foregoing arguments conclusively establish that under the Gates/Darmon test there was sufficient information to establish probable cause contrary to the allegations of the defendant, a separate analysis of this case under United State v. Leon, 104 Supr. Ct. 3405 (1984) and State v. Herrick, 1999 ND 1, 588 NW2d 847. (Leon/Herrick) would be appropriate should the Court disagree

with our analysis under Gates/Darmon. The North Dakota Supreme Court, in State v. Herrick, 1999 ND 1; 588 NW2d 847, recently adopted the Leon "good faith exception" to the exclusionary rule. The rationale of the good faith exception is, of course, that since the exclusionary rule is designed to deter police misconduct, if the police do what they are supposed to do and obtain a search warrant and the search warrant is later found to be invalid, evidence obtained as a result of that search should not be suppressed as law enforcement did all it reasonably could be asked to do to conform to the requirements of the Fourth Amendment. The Leon court held that the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. The Leon court stated a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search. The Leon court stated that suppression remains an appropriate remedy under certain exceptional situations including; (1) if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth, (2) if the issuing magistrate wholly abandoned

his judicial role, (3) if the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, and (4) if the affidavit is so facially deficient i.e. in failing to particularize the place to be searched or things to be seized, that the executing officers cannot reasonably presume it to be valid.

In the case before this Court, the police obviously did what they were supposed to and received a search warrant after having presented an affidavit and search warrant to a detached and neutral magistrate and her signing the same. Clearly the exceptions to Leon do not apply in this case.

In this case, BCI Agent Marchus indicated that based on the reports from Enget and Peters (which had been corroborated) and the finding of the marijuana in the Defendant's abandoned vehicle and the Defendant's then current status regarding his South Dakota charges, Marchus felt there was sufficient information to seek a search warrant of A17 Jefferson. The Magistrate and Judge Holum agreed with him. To now attempt to argue that Agent Marchus should have known that both were wrong seems absurd.

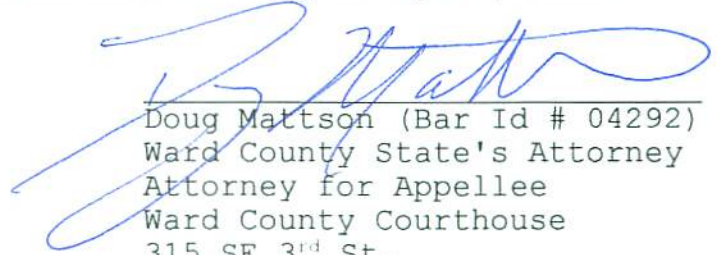
Conclusion

In conclusion, it is the contention of the State that there was probable cause for the issuance of the search warrant under the prevailing Gates/Darmon analysis in the State of North Dakota. Alternatively, should the Court

disagree with the analysis of the State, it is asserted that under the Leon/Herrick good faith exception which has recently been adopted by the state of North Dakota, the warrant should be upheld as the officer was clearly acting in good faith on a warrant issued by a detached and neutral magistrate.

For the foregoing reasons, the State respectfully requests that the Defendant's motion to suppress evidence be denied in it's entirety and the judgment be affirmed.

Respectfully submitted this 9th day of April, 2002.



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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)
 Appellee,)
) Supreme Court No. 20010306
 vs.)
) AFFIDAVIT OF SERVICE BY MAIL
Michael Duane Taylor,)
 Appellant.)

Kim Cook, 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 10th day of April, 2002, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action:

APPELLEE'S BRIEF

That said envelope was addressed to the following person at his address as follows:

Kelly Dillon
Attorney at Law
P.O. Box 3118
Minot, ND 5870203118

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Kim M. Cook
Kim Cook

Subscribed and sworn before me this 10th day of April, 2002.

Nyla J. Sorensen
Nyla J. Sorensen, Notary Public
Ward County, North Dakota
My commission expires: 11-28-2007

