

ORIGINAL

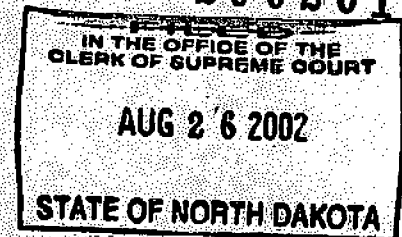
**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

State of North Dakota,)
)
)
Plaintiff/Appellee,)
)
-vs-)
)
Michael Verne Jones,)
)
Defendant/Appellant.)

SUPREME COURT NO. 20020118

DISTRICT COURT NO. 01-K-3187

20020118



**BRIEF OF DEFENDANT/APPELLANT
MICHAEL VERNE JONES**

**APPEAL FROM CRIMINAL JUDGMENT AND COMMITMENT
ENTERED ON MAY 9, 2002
IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA
THE HONORABLE NORMAN J. BACKES**

**MONTY G. MERTZ (#03778)
Attorney at Law
1308 23rd Street South
P.O. Box 10396
Fargo, ND 58106-0396
Phone (701) 293-7788
Fax (701) 293-7269
Attorney for Defendant/
Appellant Michael Verne Jones**

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF THE ISSUES 2

STATEMENT OF FACTS 3

ARGUMENT

I. The Trial Court erred by not allowing Michael Jones to withdraw the waiver of his Preliminary hearing. 9

II. The Trial Court erred by denying Michael Jones' Motion to Suppress. 10

III. The Trial Court erred by not dismissing the charges against Michael Jones due to official misconduct. 13

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

<i>Franks v. Delaware</i> , 438 U.S. 154 (1978)	10
<i>United States v. Hollywood Motor Car Co.</i> , 646 F.2d 384 (9 th Cir. 1981)(reversed on other grounds 458 U.S. 262)	13, 14
<i>United States v. Levy</i> , 577 F2d 200 (3 rd Cir. 1978)	14
<i>United States v. Valencia</i> , 541 F2d 618 (6 th Cir. 1976)	14
<i>United States v. Broden</i> , 528 F2d 214 (7 th Cir. 1975)	14
<i>United States v. Velsical Chemical Corp</i> , 498 F. Supp. 1255 (D.C. Dist Ct 1980)	13
<i>United States v. Pascal</i> , 496 F.Supp. 313 (ND Ill. 1979)	14
<i>State v. Birk</i> , 484 N.W.2d 834 (N.D. 1992)	11
<i>State v. Dymowski</i> , 458 N.W.2d 490 (N.D. 1990)	11
<i>State v. Eldred</i> , 1997 ND 112, 564 N.W.2d 283	9
<i>State v. Frohlich</i> , 506 N.W.2d 729 (N.D. 1993)	11
<i>State v. Hage</i> , 1997 ND 175, 568 N.W.2d 741	10
<i>State v. Herrick</i> , 1997 ND 155, 567 N.W.2d 336	11
<i>State v. Lewis</i> , 527 N.W.2d 658 (N.D. 1995)	11
<i>State v. Ringquist</i> , 433 N.W.2d 207 (N.D. 1988)	11
<i>State v. Ronngren</i> , 361 N.W.2d 224 (N.D. 1985)	10
<i>State v. Rydberg</i> , 519 N.W.2d 306 (N.D. 1994)	11
<i>State v. Schmidt</i> , 2001 ND 57, 623 N.W.2d 409	10
<i>State v. Van Beek</i> , 1999 ND 53, 591 N.W.2d 112.	10

<i>People v. Walls</i>, 324 NW2d 136 (Mich. App. 1982)	14
<i>State v. Winkler</i> , 552 N.W.2d 347 (N.D. 1996)	11
Statutes	
NDCC Chapter 12.1-32	16
NDCC Section 12.1-32-07	16
NDCC Section 19-03.1-23	1
NDCC Section 19-03.4-03	1
NDCC Section 19-03.1-36	16
NDCC Chapter 29-31.1	16
NDCC Section 62.1-01-02	16
Rules	
Rule 5(c)(1), N.D.R.Crim.P.	9
Other Authorities	
Annot. 57 ALR Fed 824, <i>When is Dismissal of Indictment Appropriate Remedy for Misconduct of Government Official.</i>	13

STATEMENT OF THE CASE

This is an appeal from a Criminal Judgment and Commitment entered on the 9th day of May, 2002, by the Court, the Honorable Norman J. Backes, Judge of the District Court, presiding, as a result of the Defendant, Michael Verne Jones' conviction upon a jury verdict (App. at 6 - 11).¹ (Docket Nos. 81 & 82).

Mr. Jones was charged by information in count one of Possession of a Controlled Substance, (methamphetamine) in violation of **NDCC Section 19-03.1-23**, a Class C Felony; in count two of Possession of Drug Paraphernalia, in violation of **NDCC Section 19-03.4-03**, a Class A Misdemeanor; and in count three, Possession of a Controlled Substance, (marijuana in excess of one ounce) in violation of **NDCC Section 19-03.1-23**, a Class C Felony. (Docket No. 1 & App. 10). An Amended Information was filed, which did not alter the charges. (Docket No. 69 & App. 12).² Mr. Jones was arrested on a warrant, and made his first appearance on October 15, 2001. Bond was set. (See Docket Nos. 4 - 10).

A preliminary hearing was set for November 8, 2001 at 1:30 p.m. Mr. Jones appeared and applied for court-appointed counsel. The preliminary hearing was re-scheduled. On November 29, 2001, Mr. Jones appeared with his court-appointed attorney and waived his right to a preliminary hearing and entered pleas of not guilty. (Docket No. 20). On December 5, 2001, a letter was filed from the court-appointed attorney, who claimed a conflict of interest, and a new attorney was

¹**Defendant Michael Verne Jones shall be referred to herein as Mr. Jones.**

²**The Appendix will be referred to herein as App., followed by the page number.**

appointed. (Docket No. 21). A Scheduling Order was issued, setting a new date for a Preliminary Hearing, which did not take place due to the earlier waiver of the same. (Docket No. 24). Pre-trial motions were filed and were to be heard on February 20, 2002. They were not heard because the State applied for and was granted a continuance without notice or hearing. The Defense filed an objection to said continuance. (Docket entry dated February 20, 2002; and entries 37 & 38). The Motion hearing was held on April 3, 2002). A felony jury trial was held on May 7 and 8, 2002.³ Mr. Jones was found guilty of all charges by the jury, and a Criminal Judgment and Commitment was entered on May 9, 2002. (Docket No. 82, App. 32). A Notice of Appeal and an Order for transcript were filed on May 13, 2002)(Docket No. 85, App. 8).

STATEMENT OF THE ISSUES

I. Whether the Trial Court erred by not allowing Michael Jones to withdraw the waiver of his Preliminary hearing. 9

II. Whether the Trial Court erred by denying Michael Jones' Motion to Suppress. 10

III. Whether the Trial Court erred by not dismissing the charges against Michael Jones due to official misconduct. 13

³ There are two transcripts, which will be referred to herein by the date and the page number such at 4-3-02 Tr. 1-6 or 5-02 Tr. 1.

STATEMENT OF FACTS

On June 7, 2001, Detective Mitch Burris applied for and obtained a "no-knock" search warrant to search the premises located at "1042 4th Street North, Fargo, Cass County, North Dakota." (4-3-02 Tr. 9). Copies of the Application and Affidavit for Search Warrant, as well as the Arrest Reports and the Evidence Inventory were attached as Exhibits to the motion filed by Mr. Jones. (Docket 28). The basis for the application for the search warrant included:

1. Burris got a call from a detective from the Ramsey County Sheriff's Department who related that a "Reliable Confidential Informant" (RCI) received information from a third party, who identified his source for heroin as a Mike Jones from Fargo.

2. On June 5, 2001, a garbage search was conducted at the premises, which uncovered some baggies and some powder which field tested as methamphetamine, and an empty bottle of pseudoephedrine, and some notes about guns.

3. Burris talked to a Charles Anderson of the Clay County Sheriff's office, who had questioned a Bruce Wrolstad, who claimed that Mike Jones sold him heroin.

The "no-knock" provision was based solely upon the third-hand information that Mike Jones may or may not have firearms in his residence.

Mr. Jones filed his own Affidavit in support of his Motion to Suppress, along with a Affidavit by a man named Russell Moser. (Docket Nos. 39 & 40, App.23 &28). Mr. Jones stated in part as follows:

2. Local police, acting under the umbrella of a high-sounding, "Combined Law Enforcement (Drug) Task Force", have entirely too much discretionary power. On June 8, 2001, they used that power to convince a Cass County

judge to allow them a no-knock warrant for our home. They broke into our home as jack-booted/helmeted Nazi thugs, with flak jackets, machine guns, and sawed-off shotguns, scared my wife half-to-death, and held both of us in handcuffs and/or behind bars for the next ten hours, with the excuse that they were executing a search warrant, "...for evidence of narcotics trafficking...".

3. I have lived at 1042 4th Street North, Fargo, North Dakota, since August, 1962; my wife, Brenda Jones, has lived at this residence since our marriage in 1988. We have had our 4th Amendment Rights stomped into the dirt. We ask for help in a matter we never dreamed could happen to people like us, at least not in North Dakota.

4. This is my explanation of how we came to be unjustly targeted. (I relayed these facts to the U.S. Secret Service in Fargo, in February-March, 2001, and Kent Conrad's Fargo office about a month later.)

5. Bruce Wrolstad is a psychotic heroin and speed junkie, a drug-dealing murderer, a twice-convicted violent felon, who threatened my life by giving me a live .380 pistol round 'with my name of it' in mid-winter of 1973-'74, after I publicly accused him of having slashed the throat of Ronnie Knudsen of Moorhead; Wrolstad had done so. When Wrolstad and I crossed paths again in August, 2000, he renewed his threat, and I determined to get him off the street and back behind bars; although it took over 9 months, I did so, in the following manner.

6. In February, 2001, after I had been snooping on my own for almost 5 months, I found out that Wrolstad had talked a girl, Bonnie (I do not know her last name), into accompanying him to Chicago to buy heroin, using money from a stolen Social Security check, the check belonging to Colleen Davis, an inmate at the Jamestown Correctional Center. Wrolstad had stolen the check from Colleen Davis' mail and he needed Bonnie for his scheme to get the check cashed, as shall be seen below.

7. Wrolstad convinced Bonnie to pretend to be Colleen Davis. They drove to Chicago, and in Chicago, Bonnie tried to cash Colleen Davis' check at one of those "We Cash Government Checks" establishments most big cities have. But Bonnie couldn't get anyone to cash the check; she had no acceptable ID. So Wrolstad bought "a little bit" of heroin, from the "Chicago Connection" whom he had been buying heroin from for months, drove back into Wisconsin, where Wrolstad maintains a checking account for clandestine monies, and deposited the stolen check, endorsed by Bonnie, into that Wisconsin account. They then (Wrolstad and Bonnie) came home (to Moorhead).

8. I saw this information as an opportunity to put Bruce Wrolstad away, and I called my company's attorney, Mark Schneider, of *Schneider, Schneider, & Phillips* in Fargo, and told Mark the above. Mark told me to call the acting U.S. Attorney, Lynn Crooks; I did, and got to speak to Mr. Crooks personally. After hearing my story, Mr. Crooks gave me the telephone number for the U.S. Secret Service in Fargo.

9. I called the Secret Service at the Fargo number Mr. Crooks gave me, and told the Agent that Mr. Crooks had referred me, and explained briefly why I was calling. The Secret Service Agent told me to come to his office, which I did. The Secret Service Agent took down all the information as laid out above, including my claim that Bruce Wrolstad was a murderer and an active heroin trafficker/dealer/user. The Secret Service Agent gave me the Soc. Sec. form needed to request a search for a lost or stolen Soc. Sec. check. I was told to give the form to Colleen Davis, owner of the Soc. Sec. check Bruce Wrolstad had stolen, for her to fill out so that we could, in the Secret Service Agent's words, "...get the ball rolling on an investigation."

10. I sent the form to Colleen Davis at Jamestown Correctional Center, but after checking with her several times over the following weeks, and finding out that she didn't get the form, I called and left several messages at the Fargo Secret Service Agent's office, explaining that I needed another form. When the Secret Service Agent didn't return my calls, I went to the Soc. Sec. office in Fargo, explained what was going on, and asked them for another form. Soc. Sec. treated me so rudely that I stormed down the hallway and banged on the Secret Service Agent's door; no answer.

11. But U.S. Senator Kent Conrad's Fargo office is right next door to the Secret Service Agent's, so I went in and told them my sad tale of woe, i.e., my complete dissatisfaction with both the Secret Service and Soc. Sec., and they (the people in Senator Conrad's office) promised to look into it. Senator Conrad's office has a record of my complaint, including my report to the Secret Service Agent, and their own follow-up, on file. I believe Senator Conrad's office's queries finally got the Secret Service Agent in gear, and that he reported my information to the Moorhead or Fargo police. I had told the Secret Service Agent that Bruce Wrolstad lived in Moorhead. On June 5, 2001, Bruce Wrolstad was arrested for selling heroin to an undercover agent. And here is where the problem begins for me and my wife.

12. According to Cass County Sheriff/police reports, as part of his plea-bargain Bruce Wrolstad gave my name to Moorhead police as his heroin connection. Moorhead police reported Bruce Wrolstad's "tip" to Cass County Sheriff's Deputy Mitch Burris, telling Burris where they got the "tip". That

night, June 5, 2001, based on the word of Bruce Wrolstad, an under-arrest, twice-convicted violent criminal, whom they knew to be a psychotic junky and a heroin dealer, Cass County deputies searched my garbage!

13. Don't we still don't have the 'benefit of a doubt' when so serious an accusation is made by someone of the likes of Bruce Wrolstad, and/or the right to fact our accuser, before the police breaks into our garbage, and then, under the auspices of a no-knock search warrant, breaks into our home and treats us as if we had threatened the life of the President of the United States, don't we?

14. No one ever asked me for an explanation, a simple one, which I can provide and verify, of how "evidence" came to be in my garbage or home. (Note: All of the "evidence" that the cops gathered/seized [along with the seizure of all of my firearms, which they threaten to keep, along with threatening the seizure/confiscation of our home] comes to be in their possession as a result of an illegal search of our garbage, and a subsequent illegal search of our home.) All of the "evidence" they've used to bring charges against me and Brenda was gathered by me during the eight + months I was trying to "get something" on Bruce Wrolstad, and I can prove it, if I'm now required, in the United States of America, to prove my innocence.

15. Originally my wife and I each faced three criminal charges: one felony count of Possession of a Controlled Substance, one misdemeanor count of Possession of a Controlled Substance, and one misdemeanor count of Possession of Drug Paraphernalia. Currently, my wife Brenda, is out of jail on an ROR bond; I am out of jail on a 10%/\$5,000 bond. All of our neighbors are stunned by these events. They no more believe the police's allegations than they believe Brenda and I are Martians. (When Brenda said to her friend next-door, "They could at least give us the bail back; we really need the money, and they must know we're not going anywhere," her friend replied, "Give back the *bail*? What about giving back your *lives*?")

16. My story can be verified through Senator Conrad's Fargo office and the Fargo office of the Secret Service. If forced to stand trial, I can and will call or subpoena witnesses, and/or representatives of all agencies involved, to verify every statement I have made herein.

In his affidavit, Mr. Moser details direct knowledge that Bruce Wrolstad had intentionally implicated Mr. Jones in drug trafficking activities to retaliate against Mr. Jones for the investigation of Mr. Wrolstad. (Docket No. 40, App. 28).

All of the information about alleged drug dealing by Mr. Jones in Ramsey County, North Dakota, came through hearsay three times removed. The Ramsey County officer, Detective Hamre, told Mr. Burris that he, Detective Hamre, had spoken to an informant, who had in turn heard from a third person about Mr. Jones' supposed activities. (4-3-02 Tr. 8). Mr. Burris would not represent that Bruce Wrolstad was a reliable source of information. (4-3-02 Tr. 21). Detective Burris seized a number of firearms from Mr. Jones, even though firearms were not mentioned anywhere in the search warrant application or in the warrant itself. Mr. Jones had received a valid concealed weapons permit.(4-3-02 Tr. 20-22).

Mr. Jones offered two exhibits in support of his claim of Prosecutorial Misconduct. (Defendant's Exhibits 1 & 2, Docket Nos. 43 & 44, App. 14 & 15), which included a letter to the States Attorney and a chronology of events pertaining to his prosecution. The Docket states that these exhibits were offered and received. However, the transcript reflects that the judge initially sustained an objection to the introduction of these exhibits. (4-3-02 Tr. 28). Other comments by the judge confused whether he reconsidered that ruling. At any rate, counsel then tendered Defendant's Exhibit 2 as an offer of proof as to the allegations of official misconduct. (4-3-02 Tr. 29). Mr. Jones testified that the State maintained the charges filed against his wife to pressure him to plead guilty. He maintained that the State had conceded that the charges against her were frivolous. (4-3-02 Tr. 34). Mr. Jones wanted to pursue a preliminary hearing in order to bring his case to a head. (4-3-02 Tr. 35-36). Mr. Jones' first attorney advised him to waive his preliminary hearing

after a conversation of about one minute, and then withdrew, claiming a conflict just days later. (App. 20, Defendant's Exhibit 2, Docket No. 44; also 20 & 21).

During the search of the Jones' residence, a number of items were seized by the officers. A number of the items that were seized were not contraband. (5-02 Tr. 37). Two small baggies containing methamphetamine were found in a bedroom upstairs, on top of a bookshelf. This was not the bedroom used by Mike and Brenda Jones. (5-02 Tr. 39). Marijuana was found in the kitchen and the basement. (5-02 Tr. 31-35). The marijuana all together totaled just over one ounce. Brenda Jones testified that the syringes found in her dresser were used for vitamin shots taken by Mr. Jones. (5-02 Tr. 43).

Mr. Jones was born and raised in Fargo, and lives in his family home. He is on total disability from Crohn's disease. (5-02 Tr. 46-47). Mr. Jones received a box containing a radio scanner from a man in partial settlement of a debt. He later found some items including two baggies and "dope paraphernalia" in the box. (5-02 Tr. 50). He threw everything away except the two baggies, which he thought were either fruit fresh or "speed." He did not know what the baggies contained until they were analyzed. (5-02 Tr. 51). Mr. Jones identified Exhibits 2, 3, 4, 5 and 6. He knew they were in his house. He kept them for his friend, Ken Pier. Mr. Pier lives in a nursing home, and has late stage multiple sclerosis. He uses marijuana for relief of his symptoms. (5-02 Tr. 52-53). Most of the marijuana was seeds and stems stored in a metal box which came from cleaning out Mr. Pier's apartment when he moved to the nursing home. Mr. Jones did not remember that they were

still in his house. (5-02 Tr. 54-55).

ARGUMENT

I. The Trial Court erred by not allowing Michael Jones to withdraw the waiver of his Preliminary hearing.

An essential stage of criminal proceedings is the right to a preliminary hearing. Mike Jones did not voluntarily waive his preliminary hearing; he waived it based upon erroneous advice from his former attorney, who did not fully discuss or explain the process to him. Mr. Jones asked to be allowed to withdraw his waiver of his preliminary hearing and have a preliminary hearing. "Under **Rule 5(c)(1), N.D.R.Crim.P.** , a defendant charged with a felony has a right to a preliminary hearing and, if assisted by counsel, can waive this right." ***State v. Eldred, 1997 ND 112, ¶¶ 4,5 & 6, 564 N.W.2d 283.*** Mr. Jones does assert that he was denied effective assistance of counsel when he waived his right to a preliminary hearing. (Defendant's Exhibit 2, App. 20, Docket No. 44). After a one minute conversation he was simply told to waive his right to a preliminary hearing, without any real explanation. The Court would please recall that this was the second "complete" prosecution of Mr. Jones on these charges. (Defendant's Exhibit 2, App. 15- 22, Docket No. 44). Mr. Jones was prejudiced by this waiver, and the trial court did abuse its discretion when it denied his motion to withdraw his waiver of a preliminary hearing. A preliminary hearing gives the Defense an opportunity to test the State's evidence. In Cass County, North Dakota, the State proceeds by Information. The Preliminary Hearing is an important safeguard by requiring judicial scrutiny of the

charges. It should not be reduced to a mere formality for the sake of expedience. The Trial Court may very well have found probable cause to bind the Defendant over to answer the charges. However, that is not a reason to find Mr. Jones was not prejudiced by the waiver. There was no good or “tactical” reason to waive the preliminary hearing in this case.

The Trial Court’s denial of a preliminary hearing should be reversed, the judgment should be reversed, and the case remanded for dismissal of the charges.

II. The Trial Court erred by denying Michael Jones’ Motion to Suppress.

Mr. Jones submits that the “no-knock” search warrant in this case was obtained with an affidavit which contained false statements, which were made intentionally or with reckless disregard of the truth, pursuant to the principles set forth in *Franks v. Delaware*, 438 U.S. 154,155-156 (1978), *State v. Schmidt*, 2001 ND 57, 623 N.W.2d 409, and *State v. Van Beek*, 1999 ND 53, 591 N.W.2d 112. The information used to obtain the search warrant, and to support the garbage search at the residence, was all based upon false information from Bruce Wrolstad. The authorities dealing with Wrolstad knew or had reason to know that Wrolstad is an inherently unreliable source of information. The search warrant was otherwise not properly granted, as the evidence in support of issuance was inadequate, and the search of Defendant’s garbage was improper. **See *State v. Ronngren*, 361 N.W.2d 224 (N.D. 1985).**

In *State v. Hage*, 1997 ND 175, 568 N.W.2d 741, this Court stated:

[¶ 10] Whether probable cause exists to issue a search warrant is a

question of law. ***State v. Herrick*** , 1997 ND 155, ¶12, 567 N.W.2d 336 (citing ***State v. Winkler*** , 552 N.W.2d 347, 353 (N.D. 1996)). In reviewing a search warrant's validity, a trial court determines whether the magistrate granting the warrant had information which established probable cause for the search. ***State v. Rydberg*** , 519 N.W.2d 306, 308 (N.D. 1994); ***State v. Frohlich*** , 506 N.W.2d 729, 732 (N.D. 1993). Probable cause to search does not require the same standard of proof necessary to establish guilt at trial; rather, probable cause to search exists if it is established that certain identifiable objects are probably connected with criminal activity and are probably to be found at the present time at an identifiable place. ***State v. Ringquist***, 433 N.W.2d 207, 212 (N.D. 1988). The magistrate issuing the search warrant "is to make a practical, commonsense decision whether, given all the information considered together, there is a fair probability contraband or evidence of a crime will be found in a particular place." ***Rydberg*** , 519 N.W.2d at 308.

[¶ 11] We review the search warrant's validity in the same manner using the "totality-of-the-circumstances" approach, independent of the trial court's determination. *Id.* We consider all information for probable cause together, not in a piecemeal manner, and we test affidavits executed in support of a warrant in a commonsense and realistic fashion, not in a hypertechnical manner. ***State v. Birk***, 484 N.W.2d 834, 837 (N.D. 1992). We give deference to the magistrate's factual findings in determining probable cause, ***Frohlich***, 506 N.W.2d at 732, and will not disturb a magistrate's conclusion on appeal if there is a substantial basis for the conclusion that probable cause exists. ***State v. Lewis*** , 527 N.W.2d 658, 661-62 (N.D. 1995) (citing ***State v. Dymowski***, 458 N.W.2d 490, 498 (N.D. 1990)).

There certainly is no "substantial basis" that probable cause existed for the issuance of the warrant in this case. Mr. Jones established that Bruce Wrolstad was the source of the intelligence which led to the search of Mr. Jones' garbage. Without the false information from Wrolstad, who had the motive to lie about Mr. Jones' supposed involvement in drug trafficking, and who, in effect, planted the methamphetamine in Mr. Jones' house, there never would have been a garbage search. The garbage search actually uncovered the "Wrolstad garbage." The

scanner box came into Mr. Jones' possession just prior to the time Deputy Burris began his investigation. A very convenient coincidence. (Moser Affidavit App 28-31).

The Trial Court should have, and this Court now should also, look at the reality of what was claimed by the informants and what was actually found in Mr. Jones' home. The informants represented that Mr. Jones was a source of black tar heroin. (See the Affidavit in Support of the Search Warrant Docket No. 28; 4-3-02 Tr. 10 & 13). There was absolutely no evidence found during the search of Mr. Jones' house which corroborated what the informants claimed. There were two small baggies of methamphetamine found in plain sight on top of a bookcase. There was no evidence or trace of any heroin. There was no currency found. There was no drug packaging found, other than in the "Wrolstad garbage." Burris referred to a "breakdown sheet" that was found on the dining room table. (Docket No.78, 5-02 Tr. 34-35). It was not located near any packaging, money or drugs. A common sense analysis of the totality of the circumstances corroborates Mr. Jones' version of events. Deputy Burris did not conduct any surveillance to corroborate drug trafficking activity by Mr. Jones. Even the garbage search did not corroborate the informant's information. There was no trace of or reference to any heroin. That is what Wrolstad and the other unknown informant claimed he was selling. The fact that marijuana and a small amount of methamphetamine was found during the search gives only scant support, in hind sight, to the validity of the issuance of the search warrant. As the saying goes, even a blind squirrel finds some nuts on occasion.

It is the Defendant's position that all of the items found in the residence should have been excluded from evidence, as it was obtained in violation of the Defendant's Constitutional rights under the Fourth Amendment to the United States Constitution, and Article I, Section 8, of the North Dakota Constitution, and applicable case law.

III. The Trial Court erred by not dismissing the charges against Michael Jones due to official misconduct.

Mr. Jones submits that the charges in this case should be dismissed, based upon official misconduct. This is the second time that Mr. Jones is being prosecuted for these charges. The State previously dismissed the charges on its own motion, claiming the unavailability of a witness. The state then re-filed the charges and had Mr. Jones arrested again. The state had conveyed the fact that, if Mr. Jones would plead guilty, the baseless charges against Mr. Jones' wife, Brenda, would be dismissed. (See App. 15-22).

Misconduct of government officials can result in the dismissal of charges. **Annot. 57 ALR Fed 824, *When is Dismissal of Indictment Appropriate Remedy for Misconduct of Government Official*.** This annotation reports a number of decisions which ruled that dismissal of criminal charges because of government misconduct was too drastic a remedy, but the following decisions found that dismissal was the appropriate remedy. ***United States v. Hollywood Motor Car Co.*, 646 F2d 384 (9th Cir. 1981)(reversed on other grounds 458 U.S. 262)(vindictive prosecution); *United States v. Velsical Chemical Corp*, 498 F.**

Supp. 1255 (D.C. Dist. Ct.); *United States v. Pascal*, 496 F.Supp. 313 (ND Ill 1979)(promises by DEA agents); *United States v. Levy*, 577 F.2d 200 (3rd Cir. 1978)(informer sat in on meetings between defendant and his attorney). *United States v. Valencia*, 541 F.2d 618 (6th Cir. 1976)(co-defendant's attorney's secretary was a paid government informant, disclosed files); *United States v. Broden*, 528 F.2d 214 (7th Cir. 1975)(government wiretapping violation); *People v. Walls*, 324 NW2d 136 (Mich. App. 1982)(prosecutor misconduct, re-filed charges after dismissal due to adverse ruling).

It appears that the courts couch the analysis of a claim of official misconduct in terms of the right to due process of law. There does not appear to be a neat formula to determine when the official misconduct rises to the level of a violation warranting the dismissal of charges. The two cases of ***United States v. Hollywood Motor Car Co.*, 646 F.2d 384 (9th Cir. 1981)(reversed on other grounds 458 U.S. 262)(vindictive prosecution) and *People v. Walls*, 324 N.W.2d 136 (Mich. App. 1982)(prosecutor misconduct, re-filed charges after dismissal due to adverse ruling)** are instructive, but not dispositive. In ***Hollywood***, the Court found that increasing the severity of charges in response to a Defendant's exercise of rights was a violation of due process. **646 F.2d at 386**. In ***Walls***, the prosecutor re-filed charges after an adverse evidentiary ruling, and was found to be blatantly judge shopping. **324 N.W.2d at 138**. Both cases are distinguishable on their facts from the facts here, to a large degree. However, there are many factors present here which, taken together, demand relief for violation of Mr. Jones' due process rights.

No case was found which matches the facts herein exactly. It appears, after reading numerous cases on the subject, that each case does rise and fall on a case by case analysis of its peculiar facts. In this case, Mr. Jones points to the following facts:

1. The search warrant was obtained through the use of unreliable, even false information. The items found in the garbage search were placed in Mr. Jones' possession by Bruce Wrolstad, the source of the lie that Mr. Jones was a seller of heroin. There was no surveillance or other attempt to corroborate the claim that Mr. Jones was a drug dealer. The offense to Mr. Jones was compounded by the use of the SWAT team, and a no-knock warrant. This was a grotesque over reaction to the information possessed by the officials before the search. The search was, of course, the genesis of the prosecution itself. (Affidavits of Jones and Moser, App. 23-31).
2. Mr. Jones was dragged through the whole process up to and including a date for a jury trial, when charges were dismissed by the State, claiming a witness was unavailable. During this time, charges remained pending against Brenda Jones, wife of Mr. Jones, which were conceded to be "frivolous" from the outset. The State insisted that Mr. Jones would have to plead guilty to achieve a dismissal of charges against Brenda Jones. (Defendant's Exhibit 2, App. 15- 22).
3. Mr. Jones was re-charged, and the misdemeanor possession of marijuana was increased to a felony charge, based upon the combined weight of all of the marijuana, the vast majority of which was garbage,

nothing more than dried up stems and seeds. (Information, Docket No. 1, App. 10; 5-02 Tr. 61-62).

4. Mr. Jones made repeated demands for a speedy resolution of the charges against him. There were repeated delays in the process by the State, including a delay of the motion hearing, approved by the Court without notice or hearing. (Docket 32 & 37).

5. The State continued to harass Brenda Jones, and subpoenaed her to trial, even though she was, if anything, a defense witness. The State knew exactly what she would say, because she had been fully debriefed before the trial. A motion to quash the subpoena was denied by the trial court. (Docket 61 & 67; 5-02 Tr. 10-11).

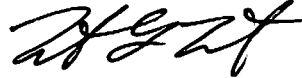
6. As one last very telling example of the State's attitude in this case, the court can look to the sentence requested by the State's attorney, and the illegal, inappropriate request that the trial court would order forfeiture of Mr. Jones' firearms. (5-02 Tr. 103-107). The State never brought a forfeiture action, and its request was extra-legal. **NDCC Chapter 12.1-32** and specifically **NDCC Section 12.1-32-07**, which govern sentencing alternatives and probation conditions, do not mention forfeiture of anything seized from a defendant. **NDCC Section 62.1-01-02** does not apply to this case. **NDCC Section 19-03.1-36 et. seq.** does not mention firearms, and requires formal forfeiture proceedings. **NDCC Chapter 29-31.1** does not apply at all to this case, and also requires forfeiture proceedings.

Thus, Mr. Jones does not point to only one of these events or circumstances as requiring dismissal of the charges against him. It is the combination of all of the facts and circumstances that result in the violation of due process, and the sense of justice and fair play. Government officials should not be allowed to generate and pursue the prosecution of a case in this manner. What is the great evil sought to be combated by the State in this case? The end result was a case of simple possession of drugs and paraphernalia. The case against a dangerous heroin dealer never materialized. Why does the State seek to justify its actions by such a vindictive pursuit of Mr. Jones? To save face somehow for its errors? Because they were embarrassed by the sheer lack of evidence that was found? This court can and should send a message to law enforcement in this State that citizens should not be used in this manner, and reverse the conviction and order dismissal of the charges.

CONCLUSION

The Judgment and Commitment should be reversed, and this case should be remanded to the trial court for entry of an order of dismissal of the Information with prejudice.

Respectfully submitted this 26th day of August, 2002.



Monty G. Mertz
ND Bar ID #03778
1308 23rd Street South
P.O. Box 2806
Fargo, ND 58106-0396
Tele. (701) 293-7788
Fax (701) 293-7269
Attorney for Defendant
and Appellant

**RE: State of North Dakota, Plaintiff and Appellee vs. Michael Verne Jones,
Defendant and Appellant
Supreme Court No. 20020118
Cass County Civil No. 09-01-K-3187**

CERTIFICATE OF SERVICE BY MAIL

I, Joy Becker, affiant, do hereby certify that, on the 26th day of August, 2002, I served the Brief of Defendant/Appellant and the Appendix upon the following, by placing true and correct copies in envelopes addressed as follows:

Ms. Penny Miller
Clerk of the Supreme Court
Judicial Wing, 1st Floor
600 East Boulevard Avenue
Bismarck, ND 58505

Ms. Tracy Peters
Assistant States Attorney
P.O. Box 2806
Fargo, ND 58108-2806
(701)241-5850
Attorney for Plaintiff/Appellee

and depositing the same, with postage prepaid, in the United States Mails at Fargo, North Dakota.

Dated this 26 day of August, 2002.



Joy Becker

Subscribed and sworn to before me this 26 day of August, 2002.



Notary Public

JAMES H. SANDERS
Notary Public
State of North Dakota
My Commission Expires 5/4/06