ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA 20020118

State of North Dakota, Plaintiff-Appellee,	)	Supreme Court No. 20020118
vs.	)	District Ct. No. 09-01-K-3187
Michael Verne Jones, Defendant-Appellant.	)	

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STATE OF NORTH DAKOTA

APPEAL FROM CRIMINAL JUDGMENT AND COMMITMENT
DATED MAY 9, 2002, ENTERED IN CASS COUNTY DISTRICT COURT,
EAST CENTRAL JUDICIAL DISTRICT,
THE HONORABLE NORMAN J. BACKES PRESIDING

APPELLEE'S BRIEF

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STATEMENT OF ISSUES

I. The issue regarding the Defendant's waiver of his preliminary hearing has not been properly brought before this Court and, even if it had been, the trial court correctly denied the Defendant's motion to withdraw the waiver of his preliminary hearing.

II. The trial court correctly denied the Defendant's motion to suppress.

III. The trial court correctly denied the Defendant's motion to dismiss based on alleged official misconduct.

STATEMENT OF CASE

The trial court denied the Defendant's motion to suppress evidence found during a search of his residence. A jury convicted the Defendant of possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia. The Defendant appeals claiming he should have been allowed to withdraw the waiver of his preliminary hearing, the trial court should have suppressed evidence found during a search of his residence, and the trial court should have dismissed the case due to official misconduct.

STATEMENT OF FACTS

On June 8, 2001, Detective Mitch Burris of the Cass County Sheriff's Office obtained a narcotics search warrant for the Defendant's residence at 1042 4th Street North in Fargo, North Dakota. (Trial tr. at 26.) Detective Burris and a number of other law enforcement officers executed the search warrant at approximately 10:00 on the morning of June 8, 2001. (Trial tr. at 26.)

The search warrant was based, in part, on information from a "reliable confidential informant" who told Detective Burris the Defendant was dealing heroin. (Appellee's app. at 4.) The informant gave specific information on drug transactions involving the Defendant. Id. The informant said the Defendant "likes to use methamphetamine and shoots up with needles." Id. The informant also said the Defendant "really likes guns" and told Detective Burris about a specific instance in which the Defendant brought guns to a drug transaction. Id.

Based on this information, Detective Burris conducted a garbage search at the Defendant's address. (Appellee's app. at 5.) Detective Burris found a number of baggies cut, torn, and tied in a manner consistent with re-packaging drugs from larger to smaller quantities. Id. Detective Burris also found powder in a baggie which field tested positive for methamphetamine. Id. Detective Burris also found pseudoephedrine which is a main ingredient in the manufacturing of methamphetamine. Id. Two days later, Detective Burris received information

from Detective Charles Anderson of the Clay County Sheriff's Office indicating that a person by the name of Bruce Wrolstad said the Defendant was Wrolstad's heroin source and that the Defendant both sells and uses methamphetamine and heroin. Id.

On June 8, 2002, law enforcement entered the Defendant's residence on the warrant. (Trial tr. at 26.) Law enforcement officers secured the residence and began searching the residence for narcotics. (Trial tr. at 27-8.) The Defendant and his wife were both present. (Trial tr. at 27.) Items discovered during the search included two baggies containing methamphetamine, a pill bottle full of marijuana, a baggie containing marijuana, rolling papers, two marijuana cigarettes, an envelope containing two more marijuana cigarettes, two marijuana pipes, and syringes. (Trial tr. at 29-37.) The State charged the Defendant with possession of methamphetamine (a class C felony), possession of marijuana (a class C felony), and possession of drug paraphernalia (a class A misdemeanor).

PROCEDURAL HISTORY

The State filed charges against the Defendant on October 10, 2001. (Appellant's app. at 1.) The Defendant first appeared on the charges on October 15, 2001. Id. The Defendant waived his preliminary hearing on November 29, 2001, and entered pleas of not guilty to the charges. Id. The trial court denied Defendant's motion to suppress and dismiss on April 3, 2002. Id. A jury convicted the Defendant of all three offenses on May 8, 2002. Id. The trial court sentenced the Defendant the same day but stayed execution of the sentence pending this appeal. (Trial tr. at 106-7.)

ARGUMENT

I. The issue regarding the Defendant's waiver of his preliminary hearing has not been properly brought before this Court and, even if it had been, the trial court correctly denied the Defendant's motion to withdraw the waiver of his preliminary hearing.

The Defendant first argues the trial court erred by not allowing the Defendant to withdraw the waiver of his preliminary hearing.

A. As a threshold matter, this issue has not been brought properly before this Court because the Defendant has not provided an adequate record on appeal.

The Defendant has not provided a copy of the transcript of the hearing in which the Defendant waived his right to a preliminary hearing. "Under Rule 10(b), N.D.R.App.P., an appellant has the duty to provide this [C]ourt with a transcript sufficient to allow 'a meaningful and intelligent review of the alleged error.'" State v. Kensmoe, 2001 ND 190, 636 N.W.2d 183 (quoting Sabot v. Fargo Women's Health Org., Inc., 500 N.W.2d 889, 892 (N.D. 1993). The appellant "assumes the consequences and the risk for the failure to file a complete transcript." Id. (quoting City of Fargo v. Erickson, 1999 ND 145, ¶ 16, 598 N.W.2d 787).

The Defendant waived his preliminary hearing on November 29, 2001.

(Appellant's app. at 2.) The hearing took place before the Honorable Norman Backes. Id. Attorney Steve Mottinger represented the Defendant. Id. The Defendant was present at that hearing. Id. The record on appeal does not contain any other information about the preliminary hearing. The State believes this lack of a factual basis for the appeal on this issue renders this Court unable to meaningfully and intelligently review the alleged error. Therefore, the State asks the Court to decline review of this issue. see State v. Kensmoe, 2001 ND 190, ¶ 14, 636 N.W.2d 183 ("if the record on appeal does not allow for a meaningful and intelligent review of alleged error, we will decline review of the issue.").

B. The Defendant voluntarily waived his right to a preliminary hearing.

This Court "will not reverse a trial court's decision to grant a counsel-assisted waiver absent evidence on the record which demonstrates there was no valid reason to waive the preliminary hearing." State v. Eldred, 1997 ND 112, ¶ 4, 564 N.W.2d 283. "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." Eldred at ¶ 4. The decision of whether to waive a preliminary hearing is a matter of trial strategy. Eldred at ¶ 4. This Court has opined it is not its role "to determine trial strategy." Eldred at ¶ 4.

In this case, Attorney Steven Mottinger represented the Defendant at the

preliminary hearing. (Appellant's app. at 2.) The Defendant acknowledged the trial court informed him of his rights at the preliminary hearing. (Motion tr. at 36-7.) There is nothing in the record indicating there was no valid reason to waive the preliminary hearing. In other words, there may, in fact, have been a reason for the Defendant to waive the preliminary hearing. For these reasons, the State urges the Court to affirm the trial court's denial of the Defendant's motion to withdraw the waiver of his preliminary hearing.

II. The trial court correctly denied the Defendant's motion to suppress.

The Defendant argues there was insufficient probable cause for the issuance of the search warrant. Specifically, the Defendant claims the affidavit of probable cause contains false statements which, if stricken from the affidavit, would leave insufficient facts to establish probable cause. The State maintains the search warrant contained sufficient facts to establish probable cause for its issuance.

A. The Defendant failed to show that Detective Burris included any allegedly false statements intentionally or with reckless disregard for the truth.

"[C]hallenges to the issuance of a search warrant, based on an allegation law enforcement made a false statement in the support affidavit, are governed by the standard set forth by the United States Supreme Court in Franks v. Delaware,"

438 U.S. 154 (1978). State v. Rydberg, 519 N.W.2d 306, 307-8 (N.D. 1994). See also State v. Rangeloff, 1998 ND 135, 580 N.W.2d 593. Under Franks, "if the defendant makes a substantial preliminary showing to justify an evidentiary hearing, the defendant has the burden at that hearing to prove by a preponderance of the evidence that false statements in the warrant affidavit were made intentionally or with reckless disregard for the truth." State v. Schmitt, 2001 ND 57, ¶ 11, 623 N.W.2d 409, Rangeloff at ¶ 9. "'A false affidavit statement under Franks is one that misleads the neutral and detached magistrate into believing the stated facts exist, and those facts in turn affect the magistrate's evaluation of whether or not there is probable cause.'" State v. Tester, 1999 ND 60, ¶ 11, 592 N.W.2d 515 (quoting Rangeloff, at ¶ 9). "A defendant is required to prove a statement is false and its inclusion amounted to perjury or reckless disregard for the truth." Tester at ¶ 11.

"Whether the defendant establishes statements in a warrant affidavit were made intentionally or with reckless disregard for the truth is a finding of fact reviewed under the clearly erroneous standard." Schmitt at ¶ 11; see also Rangeloff, at ¶ 10. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support it, on the entire evidence, [this Court is] left with a definite and firm conviction a mistake has been made." Schmitt at ¶ 12.

In this case, the Defendant claims 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." (Appellant's brief at 10.) In support of its position, the Defendant submitted an affidavit basically alleging Bruce Wrolstad was not a credible source of information. (see Appellant's app. at 23-7.) The Defendant also relies on the affidavit of Russell Moser. (Appellant's app. at 28.) Moser claims Wrolstad "lied . . . in naming [the Defendant] as his heroin souce." Id. Moser also claims "Wrolstad lied regarding [the Defendant's] alleged drug use." Id. Moser does not explain how he knows these things. Moser goes on to explain why Wrolstad was not a credible source of information. Id. at 28-31.

Under Franks, the Defendant's attack on the allegedly false statements "'must be more than conclusory and must be supported by more than a mere desire to cross-examine.'" Schmitt, at ¶ 10 (quoting Franks at 155-56) . The affidavits "should point out specifically the portion of the warrant affidavit that is claimed to be false, and they should be accompanied by a statement of supporting reasons." Schmitt at ¶ 10. In this case, the affidavits of the Defendant and Moser are, in fact, conclusory in nature. They are void of any explanation of how they know those facts are untrue. The Defendant did not submit an affidavit of Bruce Wrolstad, himself, who was the source of the allegedly false information see

Schmitt at ¶ 10 (the State conceded defendant met its burden under Franks when the three people who were the source of the information for the warrant testified contrary to the facts as contained in the warrant).

Furthermore, the Defendant relies on his own affidavit in support of his challenge to the search warrant in which he states "[n]o 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." (Appellant's app. at 26.) The Defendant explains, "[a]ll of the evidence they've used to bring charges against me . . . was gathered by me during the eight+ months I was trying to 'get something' on Bruce Wrolstad." (Appellant's app. at 26-7.) However, at the jury trial, the Defendant offered a completely different explanation of how the evidence came to be in his residence. (see Trial tr. at 48-65.) At trial, the Defendant testified the syringes were used for his vitamin B-12 injections. (Trial tr. at 48.) He also testified the methamphetamine was delivered in a scanner box by someone who owed him money and he had found two small baggies containing methamphetamine inside the box. (Trial tr. at 49-51.) The Defendant testified the marijuana and marijuana paraphernalia were in his residence because he was keeping it for a friend of his who used it for medicinal purposes. (Trial tr. at 52-55.)

Under Franks, the Defendant must prove any allegedly false statements were made "intentionally or with reckless disregard for the truth." Schmitt at ¶ 11.

There is nothing in the record indicating Detective Burris included any false information intentionally or in reckless disregard for the truth. Therefore, it is the State's position the allegedly false statements of Bruce Wrolstad should remain part of the affidavit in support of the search warrant for purposes of determining probable cause for its issuance. The State recognizes the trial court did not make any specific findings with respect to the Franks issue in this case. (see Motion tr. at 44; Appellee's app. at 7.) The State maintains that, if this is error, it is "harmless error" because even if the allegedly false statements were redacted from the search warrant under Franks, the remaining evidence would still support a finding of probable cause. see N.D.R.Crim.P. 52(a) (harmless error).

B. Even if the information law enforcement obtained from Bruce Wrolstad is redacted from the search warrant affidavit, there is still sufficient evidence to establish probable cause.

Even if the information Bruce Wrolstad gave to Detective Burris is redacted from the search warrant affidavit, the State maintains there is still sufficient evidence to support a finding of probable cause for issuance of the search warrant. In this case, the trial court found "there was valid information to support the issuance of the search warrant." (Motion tr. at 44.)

"Probable cause is required for a search warrant under the Fourth Amendment of the United States Constitution and Article I, Section 8 of the North

Dakota Constitution." Rangeloff at ¶ 16, see also State v. Thieling, 2000 ND 106, 611 N.W.2d 861. "Whether there is probable cause to issue a search warrant is a question of law." Rangeloff at ¶ 16. see also State v. Hage, 1997 ND 175, 568 N.W.2d 741. "The totality-of-the-circumstances test is used to review whether information before the magistrate was sufficient to find probable cause, independent of the trial court's finding." Rangeloff at ¶ 16, Hage. This Court gives "deference to the magistrate's factual findings in determining probable cause if there is a substantial basis for the conclusion." Rangeloff at ¶ 16.

In this case, Detective Burris conducted a garbage search at the Defendant's residence. (Motion tr. at 11.) Detective Burris found the garbage in an alley next to the Defendant's garage. Id. Detective Burris found baggies, seven corners of baggies, three knotted baggies, and four small ziplock baggies which Detective Burris believed, in his training and experience, were evidence of drug activity. (Appellee's app. at 5.) Special Agent Derek Hill field tested some powder from one of the baggies and it tested positive for methamphetamine. Id. Investigators also found an empty bottle of pseudoephedrine which is used to manufacture methamphetamine. Id.

The Defendant claims the search of his garbage was improper. The State disagrees because the Defendant had no expectation of privacy in the garbage set out for disposal and, thus, the search of his garbage did not give rise to any Fourth

Amendment issues.

Warrantless searches of garbage set out for disposal are constitutionally valid under the Fourth Amendment to the United States Constitution." Rydberg at 309 (N.D. 1994). In California v. Greenwood, the United States Supreme Court recognized, "respondents place their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so." Rydberg at 310 (quoting California v. Greenwood, 486 US 35 (1998)). "Accordingly, having deposited their garbage 'in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it' respondents could have had no reasonable expectation of privacy in inculpatory items that they discarded." Id.

In this case, the Defendant's garbage had been set out in a garbage receptacle in an alley. (Motion tr. at 10.) It had clearly been set out for disposal. The Defendant retained no reasonable expectation of privacy in the garbage. Therefore, the garbage search was constitutionally valid.

The State maintains the search of the garbage, itself, would support a finding of probable cause for the issuance of the search warrant. Officers found a number of baggies which were cut and tied in a manner consistent with drug packaging. (Appellee's app. at 5.) In State v. Theiling, this Court recognized

"baggies which were altered, by being torn and tied, may raise more suspicion than unaltered baggies since the affiant asserted those items 'indicate a common method of packaging for distributi[ng] either methamphetamine or cocaine.'" Theiling, at ¶ 9.

Furthermore, officers actually found residue in one of the baggies which tested positive for methamphetamine. (Appellee's app. at 5.) The presence of methamphetamine in the garbage coupled with the altered baggies was enough evidence to establish probable cause for the issuance of the search warrant. see Rydberg, (upholding a search warrant based primarily on cocaine residue found in the defendant's garbage); State v. Duchene, 2001 ND 66, 624 N.W.2d 668 (upholding a search warrant based primarily on items found during a garbage search); State v. Ronngren, 361 N.W.2d (ND 1985) ("search of the garbage bag, when considered with the unusual amount of traffic at the Defendant's residence and the testimony regarding reputations of [visitors] was sufficient to support a probable cause determination.); State v. Johnson, 531 N.W.2d 275 (ND 1995) ("[w]e think its reasonable for the magistrate to have concluded, from the presence of marijuana seeds in [the defendant's] garbage, that more marijuana was probably located inside his house.") Even though the garbage search itself could sustain a finding of probable cause for the issuance of the warrant, Detective Burris also included information from another "reliable confidential informant"

that the Defendant was involved in heroine trafficking.

In conclusion, the State believes the Defendant has not shown Detective Burris included any allegedly false statements intentionally or with reckless disregard for the truth in his affidavit in support of the search warrant. Even if those statements alleged to be false were redacted from the affidavit, there is still sufficient evidence to establish probable cause for the issuance of the search warrant.

III. **The trial court correctly denied the Defendant's motion to dismiss based on alleged official misconduct.**

A. **The Defendant relies on two documents which are not part of the record on appeal.**

As a threshold matter, the Defendant relies on two documents which are not part of the record. Exhibit #1 is a letter from the Defendant to the State's attorney's office, and exhibit #2 is a list of information prepared by the Defendant. (Appellant's app. at 14-22.) The Defendant attempted to introduce these exhibits at the motion hearing. (Motion tr. at 26-8.) The State objected and the Court sustained the objection. (Motion tr. at 28.) The Defendant argues the trial court then made other comments which "confused whether he reconsidered that ruling." (Appellant's brief at 7.) The Defendant does not cite to any specific portion of the transcript which would indicate the trial court reconsidered the ruling. On the

contrary, the trial court, referring to exhibit #2, said "that is purely a hearsay document that this court has already determined it will not receive." (Motion tr. at 31-2.) The State recognizes the district court docket sheets indicates both exhibit #1 and exhibit #2 were offered and received. (Appellant's app. at 1.) Because the transcript of the hearing clearly states otherwise, the State believes this is simply a clerical error.

The Defendant claims he is entitled to have these documents considered part of the record because he "tendered the exhibits as an offer of proof." (Appellant's brief at 7.) Under N.D.R.Evid. 103, an "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." An offer of proof is intended to assist an appellate court in determining the "correctness of the ruling and the prejudice in its exclusion, if any." Black's Law Dictionary at 1082 (defining "offer of proof").

In this case, the Defendant has not appealed from the trial court's ruling on exhibit #1 and exhibit #2. Rather, the Defendant is asking this Court to consider those documents as if they had been admitted into evidence. The fact that they were tendered as an offer of proof does not mean they become a factual part of the

record on appeal on any particular issue the Defendant decides to raise. Therefore, the State is requesting this Court not consider the content of exhibit #1 and exhibit #2 in this appeal.

B. **The trial court correctly denied Defendant's motion to dismiss based on official misconduct.**

The Defendant claims he is entitled to dismissal of the charges due to official misconduct. The State disagrees concluding there was no "official misconduct" in this case.

1. **There was nothing improper in obtaining or executing the search warrant.**

The Defendant first claims the search warrant itself and the manner in which it was executed was improper. This issue has been previously discussed. It is the State's position the affidavit submitted in support of the search warrant contained sufficient probable cause for its issuance. The prosecutors had nothing to do with preparing or executing the warrant.

2. **Dismissing and refiling charges does not constitute "official misconduct."**

The Defendant next argues he was entitled to a dismissal of the charges because the State dismissed the case and re-charged the Defendant at a later time. The mere act of dismissing and refiling charges does not give rise to official

misconduct. see State v. Johnson, 449 N.W.2d 232 (Neb. 1989) (finding the dismissal of misdemeanor charges and refiling felony charges before trial did not constitute "prosecutorial vindictiveness").

As long as jeopardy has not attached, the State is entitled to re-file charges. "The double jeopardy clause, found in the Fifth Amendment of the U.S. Constitution, protects against successive prosecutions and punishments for the same criminal offense." State v. Foley, 2000 ND 91, ¶ 6, 610 N.W.2d 49. "[J]eopardy attaches when the jury is empaneled and sworn." State v. Martin, 2001 ND 189, ¶ 10, 636 N.W.2d 447. In this case, the State dismissed the charges before trial. A jury had not been empaneled and sworn. Nothing prohibited the State from refiling charges because jeopardy had not attached.

The State dismissed the case because an essential witness was unavailable for trial on the date trial was originally scheduled. (Motion tr. at 38.) That witness was called to duty after the tragedy of September 11, 2001. Id. The trial court would not grant the State a continuance and, as a result, the State was left with no alternative but to dismiss and recharge the case at a later time. The State did file a motion to continue with a supporting affidavit outlining its reasons for requesting the continuance which purposely has not been included in this appeal

because it is not part of the record in this case. [1] The State dismissed the charges for an appropriate reason and there was no "official misconduct" with respect to that dismissal.

3. The State's decision to call the Defendant's wife to testify did not constitute official misconduct.

The Defendant next argues it was improper for the State to call his wife as a witness. The State maintains she was an important witness in the prosecution of this case. The Defendant and his wife lived together in the residence where the methamphetamine, marijuana, and drug paraphernalia were found. (Trial tr. at 46.) Those items could have belonged to either one of them. Her testimony was brief. (Trial tr. at 41-43.) She simply testified she was not aware of any illegal drugs or drug paraphernalia in her house. Id. The State did not have any ill-intent in calling the Defendant's wife to testify.

4. The State's sentencing recommendation did not constitute "official misconduct."

Finally, the Defendant argues it was improper for the State to request the Defendant's guns be forfeited as part of the sentence. As part of its sentencing recommendation, the State recommended the court forfeit any weapons seized

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[1] If this Court requests the State provide that document and a supplemental brief addressing this issue more specifically, the State will provide those things prior to oral argument.

during the search of the Defendant's residence as a condition of his probation. (Trial tr. at 103.) The State based its recommendation on two provisions in North Dakota law: N.D.C.C. §12.1-32-07(2) and (3). Those sections provide in relevant part as follows:

> 2. The conditions of probation must be such as the court in its discretion deems reasonably necessary to ensure that the defendant will lead a law-abiding life or to assist the defendant to do so. The court shall provide as an explicit condition of every probation that the defendant not commit another offense during the period for which the probation remains subject to revocation...
>
> 3. The court shall provide as an explicit condition of every probation that the defendant may not possess a firearm, destructive device, or other dangerous weapon while the defendant is on probation..."

N.D.C.C. §12.1-32-07(2) and (3). Under N.D.C.C. § 12.1-32-07(3), the Defendant would be prohibited from possessing a firearm as a condition of his probation. Under N.D.C.C. § 62.1-02-01, the Defendant would be prohibited from possessing a firearm for "five years after the date of conviction or release from incarceration or probation, whichever is the later." N.D.C.C. § 62.1-02-01. It was the State's position forfeiting the guns would have been a condition reasonably necessary to ensure the Defendant would lead a law-abiding life, or assist him to do so.

This Court has recognized "N.D.C.C. § 12.1-32-07 gives the court broad

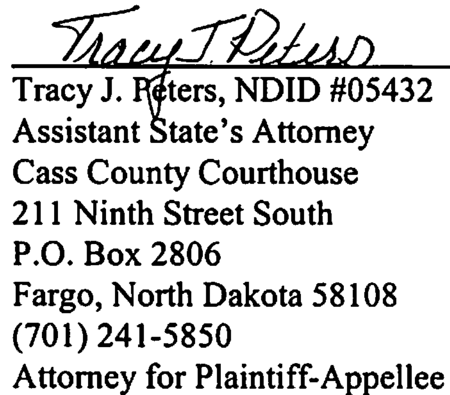
discretion to impose conditions when placing a defendant on probation." State v. Bender, 1998 ND 72, ¶ 9, 576 N.W.2d 210. However, in State v. Faleide, 2002 WL 31095764, this Court said trial courts cannot forfeit weapons as a condition of probation because "permanent forfeiture is outside the sentencing limits of N.D.C.C. § 12.1-32-07." Faleide at ¶ 8. This Court issued the Faleide decision on September 20, 2002. The State made its sentencing recommendation in the present case on May 8, 2002. In light of the Faliede decision, the State would not make the same recommendation today, however, the recommendation itself was made in good faith, relying on North Dakota law and, as such, did not constitute "official misconduct."

CONCLUSION

The trial court correctly denied the Defendant's motion to withdraw the waiver of his preliminary hearing. The trial court correctly denied the Defendant's motion to suppress. The trial court correctly denied the Defendant's motion to dismiss based on official misconduct.

For the reasons stated in this brief, the State of North Dakota respectfully requests the Court affirm the decision of the trial court.

Respectfully submitted this 10th day of October, 2002.



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