

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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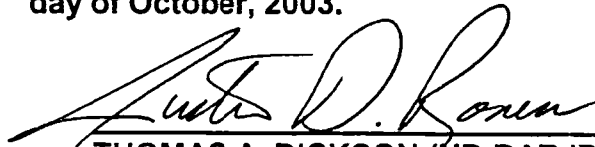
State of North Dakota,)	Supreme Court Nos. 20030219 & 20030220
)	Stutsman Co. Nos. 02-K-1042 & 02-K-1043
Appellee,)	
)	
vs.)	
)	
Monty Ray Sabinash,)	
)	
Appellee.)	

<p>FILED IN THE OFFICE OF THE CLERK OF SUPREME COURT</p> <p>OCT 15 2003</p> <p>STATE OF NORTH DAKOTA</p>
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**APPEAL FROM THE DISTRICT COURT
 STUTSMAN COUNTY, NORTH DAKOTA
 SOUTHEAST JUDICIAL DISTRICT
 HONORABLE JOHN T. PAULSON
 ORDER DENYING DEFENSE
 MOTION TO SUPPRESS DATED SEPTEMBER 2, 2003
 JUDGMENT DATED JULY 22, 2003**

APPELLANT'S BRIEF

Dated this 14th day of October, 2003.



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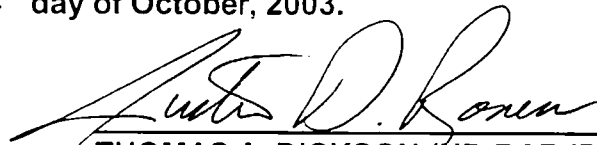
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I. **STATEMENT OF THE ISSUE**

Did the District Court err in denying Mr. Sabinash's motion to suppress all evidence obtained as a result of his search and seizure?

II. STATEMENT OF THE CASE

Monty Sabinash appeals from a judgment of conviction resulting from his conditional pleas of guilty under N.D.R.Crim.P. 11(a)(2) to charges of Possession of a Controlled Substance and Possession of Drug Paraphernalia. On October 14, 2002, Jamestown Police Department Detective LeRoy Gross arrested Mr. Sabinash for Possession of Drug Paraphernalia, a class C felony, and Possession of a Controlled Substance, a class C Felony. (See, App. 4-7). On March 3, 2003, Mr. Sabinash appeared for a preliminary hearing. (App. 8). On June 19, 2003, Mr. Sabinash filed a Motion to Suppress Evidence. (See, App. 76 and 77). On July 2, 2003, the State filed a Response to Defense Motion to Suppress. (App. 80).

On July 7, 2003, the District Court convened a hearing on the Motion to Suppress. (App. 85). At the conclusion of the hearing, the District Court denied the Motion to Suppress. (App. 109-110). On July 22, 2003, the Judgment of conviction resulting from Mr. Sabinash's conditional pleas of guilty under N.D.R.Crim.P. 11(a)(2) was entered by the District Court. (App. 123). On July 22, 2003, Mr. Sabinash filed his Notice of Appeal. (App. 125). Subsequently, the Court issued its written Order Denying Defense Motion to Suppress on September, 2, 2003. (App. 129).

III. STATEMENT OF THE FACTS

On October 14, 2002, at approximately 1:30 p.m., Detective LeRoy Gross of the Jamestown Police Department investigated a vandalism complaint on Second Street SW in Jamestown, North Dakota. (App. 15-16). The complainant informed Detective Gross that a man sitting in a black Firebird had been parked down on the street immediately below her building. (App. 89). The complainant further explained to Detective Gross that the Firebird was still parked in the same spot. (App. 90). Based upon this conversation, Detective Gross went to investigate the vehicle. Id.

As Detective Gross approached the vehicle, two individuals came from across the street and approached the vehicle, meeting Detective Gross at the door of the vehicle. (App. 95). One of the individuals opened the driver's door of the vehicle and sat in the driver's seat with the window open. Id. The other individual, later determined to be Mr. Sabinash, stood behind Detective Gross towards the left rear quarter panel of the vehicle. (App. 32). Detective Gross bent down and began to question the individual in the vehicle. (App. 33). Detective Gross informed the individual in the vehicle that he was a detective with the Police Department and that he was investigating a crime that occurred in the area. (App. 95). As the record reflects, Detective Gross identified himself only to Mr. Hoffman:

Q: Did you identify yourself to Mr. Sabinash?

A: At that moment, no.

(App. 33, ll. 13-14,).

Further, Detective Gross was wearing plain clothes that afternoon, and he never displayed any type of badge or other documentation to identify himself as a law enforcement officer. (App. 24).

Upon questioning, Detective Gross was informed by the individual that his name was Daniel Hoffman and that the Firebird was Mr. Hoffman's vehicle. (App. 96). Detective Gross next asked whether Mr. Hoffman had been sitting in the vehicle the night before, but received no response from Mr. Hoffman. (App. 97). Mr. Hoffman then allegedly looked at Mr. Sabinash, without exchanging any words. Id.

At that point, Detective Gross turned and asked the other individual, Mr. Sabinash, whether he was sitting in the vehicle the night before. Id. Mr. Sabinash did not answer Detective Gross' question and began to walk around the rear of the car towards the sidewalk. (App. 98-99). Detective Gross stepped in front of Mr. Sabinash without physically touching him and asked him for his name. (App. 99). Mr. Sabinash walked around Detective Gross and responded his name was "Jim Johnson." (App. 101). Mr. Sabinash then continued walking down the sidewalk. Id. After some additional conversation, Detective Gross then physically stopped Mr. Sabinash and escorted him back to the vehicle. (App. 102-103). Mr. Sabinash was then placed under arrest for providing a false report to law enforcement, and the search incident to that arrest resulted in the possession charges which are the subject of this appeal. (App. 104).

IV. STANDARD OF REVIEW

This Court has had numerous opportunities to address its standard of review of a trial court's disposition of a suppression motion. The trial court's disposition of a motion to suppress will not be reversed if, after conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence. State v. Zimmerman, 529 N.W.2d 171 (N.D. 1995); City of Fargo v. Thompson, 520 N.W.2d 578 (N.D. 1994). That standard of review recognizes the importance of the trial court's opportunity to observe the witnesses and assess their credibility, and we "accord great deference to its decision in suppression matters." State v. Brown, 509 N.W.2d 69, 71 (N.D. 1993). The question of whether the facts found by the trial court meet a particular legal standard is a question of law which is fully reviewable. City of Fargo v. Egeberg, 2000 ND 159, ¶ 6, 615 N.W.2d 542.

V. LAW AND ARGUMENT

1. The District Court erred in denying Mr. Sabinash's Motion to Suppress as the totality of circumstances in the present case provides that law enforcement did not possess probable cause to arrest Mr. Sabinash.

Detective Gross initially arrested Mr. Sabinash for providing a false report to a law enforcement officer. (App. 104). The false report statute, N.D.C.C. § 12.1-11-03(1), states a person is guilty of this statute if that person:

“Gives false information or a false report to a law enforcement officer which that person knows to be false, and the information or report may interfere with an investigation or may materially mislead a law enforcement officer.”

Based upon this statute, the District Court, in denying Mr. Sabinash's Motion to Suppress, found that Mr. Sabinash knew or reasonably should have known that Detective Gross was a law enforcement officer and was engaged in a vandalism investigation at the time of this incident and Detective Gross had probable cause to believe that Mr. Sabinash had falsely identified himself and that the false identification may interfere with Detective Gross' vandalism investigations. (App. 129).

Probable cause to arrest exists when the facts and circumstances within the police officers' knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in believing an offense has been or is being committed. City of Fargo v. Egeberg, 2000 ND at ¶ 8. This Court has adopted the totality of circumstances test for reviewing probable cause under Art. 1, § 8, of the North Dakota Constitution, thus following the same standard required under the Fourth Amendment of the United States

Constitution. See, State v. Ringquist, 433 N.W.2d 207, 211 (N.D. 1988). Whether certain facts constitute probable cause is a question of law, which is fully reviewable on appeal. Egeberg, 2000 ND at ¶ 8.

In assessing the totality of circumstances in the present case, we have an individual in plain clothes that never displayed any type of badge or other documentation to identify himself as a law enforcement officer during his investigation of the vandalism complaint. (App. 24). As the record reflects, Detective Gross identified himself only towards Mr. Hoffman. (App. 33, ll. 13-14). His questioning of Mr. Hoffman disclosed that Mr. Hoffman owned the vehicle that was the subject of his investigation. (App. 96). This would be corroborated by the fact that Mr. Hoffman was sitting in the driver's seat of the vehicle during Detective Gross' questioning of him. Id. Detective Gross, upon Mr. Hoffman's failure to answer the question, asked Mr. Sabinash if he was the individual in the vehicle the night before. (App. 97). Mr. Sabinash had no reason to believe he had to answer this question and began to walk away towards the sidewalk. (App. 98-99). Detective Gross stepped in front of Mr. Sabinash without physically touching him and asked him for his name. (App. 99). Mr. Sabinash walked around Detective Gross and responded his name was "Jim Johnson." (App. 101). It is conceded by both the State as well as Detective Gross that Mr. Sabinash was free to leave and was under no obligation to provide an answer to these questions. (App. 39). A reasonable person would consider himself free to leave until he was commanded not to do so or physically restrained by someone identified as a law enforcement officer. Florida v. Bostick, 501 U.S. 429, 434

(1991) ("seizure occurs when a law enforcement officer, by means of physical force or show of authority, in some way restrains the liberty of a citizen.").

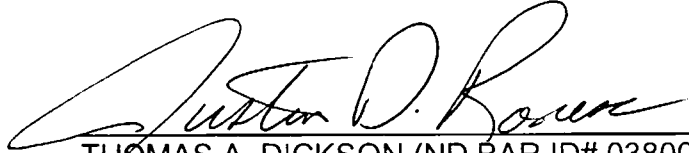
Based upon the facts in this case, it was against the greater weight of the evidence for the District Court to find that Mr. Sabinash knew or reasonably should have known that Detective Gross was a law enforcement officer and was engaged in a vandalism investigation at the time of this incident. The fact that Mr. Sabinash provided a false name could not constitute probable cause to arrest for the crime of false report to a law enforcement officer if the totality of circumstances indicated that a reasonable person in Mr. Sabinash's position would be unaware that he was being questioned by a law enforcement officer. The evidence reflects Mr. Sabinash had no more cause to truthfully answer the questions asked by Detective Gross than to truthfully answer questions posed by any other individual on the street that afternoon. Further, a law enforcement officer exercising reasonable caution would not believe that Mr. Sabinash committed a crime when he provided a false name to Detective Gross when he had not provided sufficient identification that he was a law enforcement officer. Accordingly, it was contrary to the manifest weight of the evidence for the District Court to conclude that Mr. Sabinash knew or reasonably should have known that Officer Gross was a law enforcement officer who was engaged in a vandalism investigation at the time in which Mr. Sabinash provided a false name.

VI. CONCLUSION

For the reasons set forth above, Mr. Sabinash respectfully requests the decision of the District Court denying Mr. Sabinash's Motion to Suppress be

reversed and all evidence obtained as a result of his search and seizure be suppressed based upon law enforcement's lack of probable cause to arrest Mr. Sabinash.

Respectfully submitted this 14th day of October, 2003.

A handwritten signature in black ink, appearing to read "Justin D. Roness", written over a horizontal line.

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