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20040037

IN THE SUPREME COURT OF NORTH DAKOTA

June 10, 2004

State of North Dakota, Appellant vs. Christopher Fields, Appellee.	)	Supreme Court No. 20040037 District Court No. 30-03-K-1524

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUN 10 2004

STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT, MORTON COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE BENNY A. GRAFF, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF ISSUES

1. Whether there is sufficient competent evidence fairly capable of supporting the trial court's decision to grant Field's motion to suppress evidence garnered from the May 15th search of his home.

STATEMENT OF THE FACTS

On May 28, 2002, law enforcement officers searched a vehicle belonging to the Defendant-Appellee, Christopher Ray Fields. State v. Fields, 2003 ND 81, ¶ 4; 662 N.W.2d 242. During the search, the officers discovered various items including a loaded handgun and illegal drugs. Id. The district court suppressed the evidence discovered in Field's vehicle because it was seized in violation of Field's Fourth Amendment rights. Id. at ¶5. Subsequently, this Court also ruled that the evidence was unconstitutionally seized and affirmed the district court's decision to grant Fields' motion to suppress. Id. at ¶21. According to this Court, the evidence was illegally obtained. Id.

On May 13, 2003, Officer Ray Eisenmann testified at a hearing in support of a warrant to search the home of the Defendant-Appellee Christopher Fields. Appellant's Appendix at 13. Eisenmann testified that while conducting a search of garbage collected from Fields' home, he and another officer discovered five "corner baggies with white residue powder," three "burnt tinfoilies," and a "hanger that had been cut up with strong residue smell of marijuana on them." Id. at 13-14. According to Eisenmann, one of the baggies had tested positive for cocaine. Id. at 14. Eisenmann said that he was requesting a "night / daytime search because Mr. Fields keeps strange hours" and that he had personally observed Fields "come and go from the house at all hours of the day and night." Id. After relaying this information, Eisenmann said he would like the warrant to cover a search of Fields' car and mentioned he had "personal knowledge that Mr. Fields uses that vehicle to transport narcotics. During a traffic stop he had a loaded gun, over $7,800 in cash, cocaine, LSD, marijuana, and meth paraphernalia." Id. Eisenmann failed to mention that those items were illegally obtained.

At the conclusion of the hearing, the presiding judge issued a search warrant for Fields' home and car stating, "I'll find there's sufficient reason with Mr. Fields keeping strange hours and doing – acting suspicious in the observation of the officer, peeking out, I'm assuming in sort of a countersurveillance-type mode? And I will authorize the search any time day or night, and it is a knock and announce." Id. at 16. The warrant was issued at approximately 1:50 P.M. on May 13th 2003. Id.

The warrant was executed at 12:30 A.M. on May 15th. Appendix at 2. Various incriminating items were discovered in Fields' home. Id. When charges were brought against him, Fields moved for suppression of the evidence against him, and his motion was granted. Appellant's Appendix at 10-11. According to the suppressing court,

> [a]bsent the illegally obtained evidence, the only evidence supporting the application from the garbage search was one baggie that tested positive for traces of cocaine. ... In this case, the garbage search produced little actual evidence of drugs. The evidence presented from the illegal search so overwhelmed the garbage search that it is difficult to imagine that the magistrate would have issued the search warrant if that had been the only evidence available."

Id. at 11.

Conspicuously absent from the State's brief is the fact that the warrant issued for Fields' home was not an ordinary warrant but one that authorized a search at any time of the day or night. The warrant cited "the odd hours maintained by the subject, and the propensity to violence demonstrated by the subject" as the reasons justifying its authorization of a search at any time of the day or night. Appendix at 1.

JURISDICTIONAL STATEMENT

The lower court had jurisdiction over this case pursuant to N.D. Const. Art. VI, § 8, and N.D. Cent. Code § 27-05-06(1). This Court has jurisdiction over the appeal under N.D. Const. Art. VI, § 6, and N.D. Cent Code § 29-28-06(2). The appeal is timely under N.D.R. App. P. 4(b)(1).

STANDARD OF REVIEW

When it reviews a judgment on a motion to suppress, this Court accords deference to the factual findings of the trial court. State v. Keilen, 2002 ND 133, ¶10; 649 N.W.2d 224 (quoting State v. Huffman, 542 N.W.2d 718, 720 (N.D. 1996)). This Court will not reverse a trial court's decision on a motion to suppress if "after conflicts in 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. Herrick, 1997 ND 155, ¶7; 567 N.W.2d 336, 339(quoting State v. Erbele, 554 N.W.2d 448, 450 (N.D. 1996)). "This deferential standard of review recognizes the importance of the trial court's opportunity to assess the credibility of the witnesses." State v. Fields, 2003 ND 81, ¶6; 662 N.W.2d 242; (see also City of Fargo v. Ovind, 1998 ND 69, ¶6; 575 N.W.2d 901. However, the trial court's legal conclusions are fully reviewable. Keilen, 2002 ND 133, ¶ 10; 649 N.W.2d 224. Questions of law are reviewable de novo. State v. Kitchen, 1997 ND 241, ¶ 12; 572 N.W.2d 106.

LAW & ARGUMENT

I. Officer Eisenmann inappropriately presented suppressed evidence to Magistrate Judge Romanick.

"Illegally obtained evidence cannot be the basis for a magistrate's finding of probable cause to support a search warrant." State v. Corum, 2003 ND 89, ¶9; 663 N.W. 2d 151 (citing Alderman v. United States, 394 U.S. 165, 177 (1969); State v. Winkler, 1997 ND 144, ¶ 12; 567 N.W.2d 330; State v. Runck, 534 N.W.2d 829, 833-34 (N.D.1995); State v. Kunkel, 455 N.W.2d 208, 211-12 (N.D. 1990)).

The exclusionary rule, announced by the United States Supreme Court in Mapp v. Ohio, 367 U.S. 643 (1961), requires the suppression of any evidence derived as a result of a violation of the Fourth Amendment's protections against unreasonable searches and seizures. Id. (citing to Wong Sun v. United States, 371 U.S. 471, 484 (1963) and State v. Handtmann, 437 N.W.2d 830 (N.D. 1989)). Evidence obtained as a result of an illegal search should be suppressed whether they are direct or indirect products of the search. Wong Sun, 371 U.S. 471, 484. The metaphor created by the Supreme Court to describe this evidence is "the fruit of the poisonous tree." State v. Wahl, 450 N.W.2d 710, 714 (N.D. 1990) (citing to Nardone v. United States, 308 U.S. 338 (1939)). The exclusionary rule operates as a judicial remedy or sanction against law enforcement intrusion into an individual's Fourth Amendment rights. Id.; State v. Riedinger, 374 N.W.2d 866 (N.D. 1985). By excluding evidence seized in violation of the Fourth Amendment, the exclusionary rule acts to deter police misconduct in making unreasonable searches and seizures, and to bolster judicial integrity by not allowing convictions based on unconstitutionally obtained evidence. Id. (citing to United States v.Leon, 468 U.S. 897 (1984); Handtmann, *supra*; 1 Wayne. LaFave, *Criminal Procedure* § 3.1 (1984); and C.

Whitebread, *Criminal Procedure* § 2.02 (1986)). The exclusion of evidence illegally obtained is a deterrent to future police misconduct and to "instill in investigating officers a greater degree of care toward the rights of the accused." Michigan v. Tucker, 417 U.S. 443, 447 (1974). The federal exclusionary rule has been extended to state courts, prohibiting admission of evidence obtained in violation of the Fourth Amendment through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961). Article I § 8 of the North Dakota Constitution is almost identical to the Fourth Amendment. Article I § 8 offers at least the same protections to citizens of North Dakota as the Fourth Amendment does to citizens of the United States. "It is now axiomatic that the state may grant greater but not lesser protections than the United States Constitution." State v. Herick, 1997 ND 155, ¶19 (citing State v. Matthews, 216 N.W.2d 90, 99 (N.D.1974)).

To allow officer Eisenmann to present previously suppressed evidence to the magistrate would effectively undo the exclusionary rule in this context. Upon suppression of evidence the court creates an "alternate legal reality," one where such evidence was never discovered and where no legal conclusions can be drawn from it. This is not uncommon in the field of law; these "alternate legal realities" are indeed a necessary part of law enforcement. If an officer was allowed to gather evidence illegally and then turn around and use his knowledge of that illegal evidence to obtain or bolster his claim for a search warrant, the exclusionary rule would be of little if any importance. There is nothing to support the conclusion that the Supreme Court when crafting the exclusionary rule in order to protect citizen's Fourth Amendment rights, intended to offer such a large loophole.

The State in its brief basically concedes this point. The State refers to the testimony of Eisenmann relating to the 2002 search of Fields' car as "tainted" and argues that the "tainted testimony" should be severed from the rest of Eisenmann's statements. At no time does the state argue that it was proper, or even permissible, for Eisenmann to offer statements involving the evidence obtained in the 2002 search. Because Officer Eisenmann's knowledge was obtained as a result of an illegal search, it is "fruit of the poisonous tree" and should not have been presented to the magistrate. (see Whal, 450 N.W.2d 710, (see also Nardone, 308 U.S. 338)).

II. The untainted information presented to the magistrate was not sufficient to demonstrate probable cause required for a search warrant.

When the "tainted" information is severed, the only evidence left for the State is that evidence produced from the garbage search. The state relies on State v. Johnson, 531 N.W.2d 275 (N.D. 1995) to demonstrate that this evidence gives rise to probable cause however, Johnson is easily distinguishable from the present facts. In Johnson officers had received information that Johnson was involved in drug activity and subsequently conducted a garbage search and found marijuana seeds. Id. at 277. Based on evidence discovered in the garbage search, officers acquired a search warrant for Johnson's home. Id. It should be noted that the presence of seeds along with information that Johnson was involved in drug activity would tend to indicate that Johnson was actually producing, or growing marijuana, further indicating that more drugs would be found inside. Ordinary users of marijuana probably would not possess the seeds needed to grow the plant. No seeds or other drug manufacturing equipment was found in the search of Fields' garbage. In fact the search of Fields' garbage only provided some indicia that drugs had been in

the house; it provided nothing to indicate any on-going drug activity. The present case is more reminiscent of State v. Thieling, 2000 ND 106; 611 N.W.2d 861. In Thieling agents of the North Dakota Bureau of Criminal Investigations had evidence that several individuals who were associated with drug activities had visited the defendant. Id. at ¶2. Agents conducting a garbage search finding several items associated with the possession and sale of methamphetamine and cocaine such as baggies, small pieces of plastic, and tinfoil. Id. Agents used the evidence discovered in the garbage search to obtain a search warrant. Id. at ¶3. This Court subsequently ruled that the search warrant was not supported by probable cause. Id. at ¶13. In the present case a garbage search revealed five corner baggies only one of which tested positive for cocaine, three burnt tinfoilies and a broken up hanger. Although these items are admittedly consistent with drug usage, they do not indicate any type of on-going drug activity as do the seeds found in Johnson. "Evidence of a crime alone does not furnish probable cause to search a suspect's home." State v. Mische, 448 N.W.2d 415, 419 (N.D. 1989)(citing State v. Metzner, 338 N.W.2d 799 (N.D.1983)). The evidence found in Field's garbage at most indicates that drugs had been present in the house at one time. However:

> the proper inquiry is whether the magistrate, taking into consideration the nature of the crime, the nature of the criminal, the nature of the thing to be seized, and the nature of the place to be searched could reasonably believe that the evidence of a criminal violation was probably at the specified location.

State v. Damron, 1998 ND 71, ¶17; 575 N.W.2d 912 (citing Johnson 513 N.W.2d 275, 278). In the present case the violation in question would have to be the use of controlled substance. This is evidenced by the empty corner baggies and the burnt tinfoilies, both indicate that controlled substances may have been smoked in the house at one time. They do not indicate that more drugs would be found in the house. In fact they indicate that

the drugs that were in the house have been destroyed. Without some evidence, like marijuana seeds, to indicate that there are more drugs currently in the place to be searched it would be reasonable to believe that no more evidence would be found there.

It must be noted that an argument can be made that the evidence found in the garbage search did give rise to probable cause to search the home. This Court has held that "[d]rug use can be a habituating and continuing offense." Johnson, 531 N.W.2d 275, 278 (citing Mische, 448 N.W.2d 415). This Court further stated that it was "reasonable for the magistrate to have concluded from the presence of marijuana seeds in Johnson's garbage, that more marijuana was probably located inside." Id. This ruling could be interpreted as allowing searches of homes in any case where the garbage outside the home contained evidence of controlled substance with no additional indicia to indicate that drugs would be found in the home at the time of the search. This rule is reminiscent of the blanket rule allowing nighttime, no-knock warrants in all drug cases put forth in State v. Knudson, 499 N.W.2d 872 (N.D. 1993). Both rules allow a search of a home when drugs are involved with no additional showing of probable cause. This court overruled the blanket rule of Knudson in State v. Herrick, 1997 ND 155, ¶21; 567 N.W.2d 336. The Court held "[m]ere allegations that drugs are present cannot automatically result in the issuance of a no-knock warrant. Id. (citing United States v. Moore, 956 F.2d 843, 850 (8th Cir. 1992)(blanket rule permitting no-knock warrant in all drug cases, is patently unreasonable). A blanket rule that would allow a search of a home where indicia of drug use is found without additional probable cause is no more reasonable than the blanket rule of Knudson. Just as presence of controlled substance does not per-se indicate that a suspect will attempt to destroy them when faced with law

enforcement, indicia of prior drug use does not per-se indicate that drugs will continue to be present in a suspects home. Just as the court overruled the blanket rule of Knudson it should refuse to adopt one here.

III. **Even if this Court finds that there was probable cause to issue a search warrant, there was not probable cause to issue a nighttime search warrant.**

Nighttime searches constitute a greater intrusion of privacy than do daytime searches. Monroe v. Pape, 365 N.W. 267 (1961). Supreme Court Justice Marshall stated of nighttime searches:

> Searches conducted in the middle of the night ... involve a greater intrusion than ordinary searches and therefore require a greater justification. It is now established Fourth Amendment doctrine that increasingly severe standards of probable cause are necessary to justify increasingly intrusive searches.

Wayne R. LaFave, Search and Seizure §4.7(b) at 590 (3rd ed. 1996)(quoting Gooding v. United States, 416 U.S. 430 (1974)).

A. **Issuing a nighttime search warrant requires a separate showing of probable cause.**

According to N.D. Cent. Code § 19-03.1-32(2) "[a] search warrant relating to offenses involving controlled substances may be issued and executed at any time of the day or night, if the judge or magistrate issuing the warrant so specifies in the warrant." At first glance it seems as though this statute allows a nighttime warrant in all cases where controlled substances are an issue. However, N. D. R. Crim. P. 41(c) states, "[a] warrant may be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than the daytime." Although these two rules seem to contradict each other,

one allowing a search with no showing, the other requiring a showing of reasonable cause, this Court has harmonized the two rules.

> Given our preference for harmony over conflict and reading the rule and statute together we do not believe the two conflict. Both require the magistrate to indicate in the warrant that a nighttime search has been authorized. Rule 41 contains the additional requirement that there be a sufficient showing of reasonable cause to justify authorization of a nighttime search. The statute is silent on the subject of reasonable cause. The rule thus supplements the statute, rather than contradicts it.

State v. Herrick, 499 N.W. 2d 872 (N.D. 1993). As this Court has repeatedly explained, nighttime searches are more intrusive than their daytime counterparts. State v. Knudson, 499 N.W. 2d 872, 874 (N.D. 1993)(citing State v. Berger, 285 N.W.2d 533, 538 (N.D. 1979)); (see also State v. Schmeets, 278 N.W.2d 401, 410 (N.D. 1979)). In fact, courts have long recognized the heightened degree of intrusiveness presented by nighttime searches. Schmeets, 278 N.W.2d at 410 (citing Monrow v. Pape, 365 U.S. 167 (1961); Jones v. United State, 357 U.S. 493 (1958); United States v. Ravich, 421 F.2d 1196 (2d Cir 1970), cert. Den. 400 U.S. 834 (1970); and State v. Iverson, 187 N.W. 2d 1, 32-33 (N.D. 1971), cert. Den. 404 U.S. 956)).

Due to the heightened level of intrusiveness associated with nighttime warrants they "should be authorized only after careful consideration." State v. Knudson, 499 N.W. 2d 872, 874 (N.D. 1993). Rule 41(c) "provides the benchmark for the consideration." Id., and was promulgated by this Court to "protect citizens from the trauma of unwarranted nighttime searches." Schmeets, 278 N.W.2d at 410. "The language of subdivision (c)(1), "for reasonable cause shown," is intended to explain the *necessity* for executing the warrant at a time other than the daytime," Explanatory Note to N.D.R. Crim. P. 41 (emphasis added), and has been construed synonymously with probable cause in this context. State v. Herrick, 1997 ND 155, ¶19, 567 N.W.2d 336.

B. The state did not make a showing that amounted to probable cause for a nighttime warrant.

"It would, indeed, be an empty gesture to require magistrates to consider a request for a nighttime search warrant for controlled substances without requiring them to use some benchmark on deciding whether to issue a nighttime warrant." State v. Knudson, 499 N.W.2d 872, 874 (N.D. 1993)(overruled on other grounds). According to this Court, "[t]he 41(c) reasonable cause standard provides that lodestar." Id.

1. Fields' keeping "odd hours" is not a sufficient reason to issue a nighttime search warrant.

The first justification for a nighttime search that appears on the face of the warrant is that Fields maintained "odd hours." That assertion is apparently a response to the testimony of Officer Eisenmann at the hearing on the application for the search warrant. At that hearing, Eisenmann claimed that he had "seen Mr. Fields come and go from the house at all hours of the day or night," while conducting surveillance. He further indicated that he had been surveilling Fields on and off for "the past few months." Eisenmann did not say how many times he observed Fields coming and going late at night, how often, if ever, the lights in the Fields' home were left on over night, or whether he had any knowledge as to the hours kept by the other members of the household. Certainly, a few relatively isolated incidents made during a surveillance spanning a period of months, which given the record Eisenmann's observations may well have been, can hardly establish a daily routine. In light of these deficiencies, Fields' practice of keeping "odd hours" could easily have been illusory, speculative, and the product of assumptions.

However, even if the record does establish Fields' habit of keeping "odd hours" to the satisfaction of this Court, this fact is not reason for a nighttime search. As noted above, the requirement that a nighttime search should only be authorized for reasonable cause shown, "is intended to explain the *necessity* for executing the warrant at a time other than the daytime." Explanatory Note to N.D.R. Crim. P. 41 (emphasis added). A necessity is defined as, "impossibility of a contrary order or condition, in such a way that is cannot be otherwise also." Merriam-Webster Online Dictionary, http://www.m-w.com/dictionary.htm. At minimum the word "necessity" as it is used in this context, suggests that a positive reason for such a search must be proffered and that simply pointing to the presence of circumstances that may tend to negate or reduce the extraordinary intrusiveness of a nighttime search will not suffice. Certainly the fact that the suspect has been known to stay up late on occasion does not rise to the level of necessity. At most, the request to search at night was evidence of the officer's personal preference. The whole idea of a nighttime warrant is to catch the suspect off guard, a purpose that was defeated in this case by the fact that although the warrant permitted a nighttime search, it did not waive the knock and announce requirement. A court should be wary of an officer's preference to search at night, especially in a case such as this where there is some history between the suspect and the police department. There are, perhaps, many reasons an officer may prefer to search at night in the absence of a genuine need. It is entirely possible that an officer may request a nighttime warrant because that happens to be when he will be on-duty and available to participate in the search. More ominously, it is even possible that the officer may want to conduct a more intrusive search because he relishes the idea of getting the suspect out of bed.

Furthermore, the fact that one individual living in a home may be awake at the time of the search has no bearing on whether the other occupants of the home share the suspects late-night schedule.

2. The Presence of controlled substance by itself is not a sufficient reason to grant a nighttime warrant.

This Court has held that probable cause for a no-knock warrant can no longer be established merely because of the presence of drugs. State v. Herrick, 1997 ND 155. This overruled the previously held per-se rule allowing no-knock nighttime searches in all cases involving drugs. Id. at ¶21. In suppressing the no-knock nighttime search this Court reasoned,

> The officer offered no reason for the no-knock warrant other than marijuana was easily disposed of and that Herrick would destroy the evidence if forewarned. The magistrate initiated no further inquiry as to why officers thought Herrick may dispose of any controlled substances he may have on the premises. The officer did not meet her burden of demonstrating the need of her request for the no-knock warrant. There is no evidence in this record, other than the possible existence of drugs and an explained belief that Herrick would dispose of the evidence if forewarned, demonstrating why the officers needed a no-knock warrant.

Id. at ¶23. Although Herrick deals mainly with no-knock warrants the issue is analogous to nighttime searches. Both constitute greater intrusions and both require an additional showing of probable cause to justify. In Herrick the officer actually did offer at least some testimony to indicate why she wanted the no-knock warrant, namely that the drugs would be destroyed if announcement was required. However, this Court dismissed that concern as baseless and conclusory; the officer simply had no evidence that such a thing would occur. In the present case officer Eisenmann offers even less reason to search at night, stating only that Fields' is up at all hours. At no time does officer Eissenmann proffer knowledge that the evidence in Fields' home might be lost if the warrant is served

during the day. Nor does he make reference to any circumstances constituting exigency. Officer Eissenmann offers no evidence that would make it probable that the evidence sought would be destroyed or moved that particular night. Even more telling is the fact that even though the warrant was issued at approximately 1:50 P.M on May 13th, the search was not conducted until 12:30 A.M. May 15th, nearly 33 hours later. If officer Eisenmann had knowledge that the night of May 15th would yield a successful search it should have been presented to the magistrate. If he had evidence of exigency the warrant should have been served as soon as possible. If officer Eissenmann had no such knowledge, the search could have been conducting during daytime hours on May 13th or May 14th. In fact, there is nothing to indicate that a search during daylight on these two days would have been any less successful. However, the Metro Area Narcotics Task Force still opted to conduct a more intrusive search in the middle of the night. It would be unfair to let law enforcement hide behind the prospect "of drugs being involved" to unilaterally justify the increased intrusiveness of a nighttime search. Without some additional showing of probable cause, the suspected presence of controlled substances does not indicate any exigent circumstances for issuance of a nighttime warrant.

C. Even if the Court opts not to sever the "tainted" evidence, there was not probable cause for a nighttime warrant.

1. Fields' possession of a gun is not a valid reason for issuance of a nighttime warrant.

Even if Fields' keeping "odd hours" and the presence of controlled substance did establish a reason for granting the nighttime search (the appellee makes no such contention) the other reason noted in the search warrant for granting that authorization actually counseled against such a search. Specifically, the warrant cited the "propensity

to violence demonstrated by the subject" as a reason for a nighttime search. The basis of the warrant's assertion as to Fields', violent character is not entirely clear. Notably, the record holds no evidence that Fields has ever conducted himself violently. However, it seems that perhaps, the warrant's apparent supposition of his violent character was derived from the illegally obtained evidence that had been presented to the magistrate. Specifically, the fact that a gun was discovered during the illegal May 2002 search of Fields' car may have led the magistrate to assume that Fields had a penchant for violence. In the context of a case concerning the validity of a no-knock warrant, this Court explained that "an unannounced entry by officers increases the potential for violence by provoking defensive measures a surprised occupant would otherwise not have taken had he known that the officers possessed a warrant to search his home." State v. Knudson, 499 N.W. 2d 872, 875 (N.D. 1993) (overruled on other grounds) (citing State v. Sakellson, 379 N.W.2d 779, 782 (N.D. 1985)). The court further stated that the magistrate when considering a nighttime warrant "properly gave little, if any, weight to [the officer's] concern over presence of firearms." Knudson, 499 N.W.2d 872, 875. The warrant in the instant case did not permit unannounced entry; however, the warrant's nighttime provision exacerbated the potential for a violent confrontation nonetheless. Police officers are not required to continue knocking and announcing their presence until someone answers the door. Obviously, such a requirement could be used to frustrate the legitimate efforts to conduct a search. When executing a warrant at night it is likely that individuals on the premises will be sleeping and may not be quick to answer the door for a variety of reasons. It is very possible that in their slumber, the occupants will not hear law enforcement knocking. Even if the knock is detected, it might take more time than

usual for those inside to get dressed and answer the door. Furthermore, even if someone on the premises has yet to go to bed, an unexpected knock at the door during the wee hours can inspire fear and uncertainty that may cause the door to go unanswered or even prompt a person inside to pick up a weapon. Under these circumstances forcible entry could easily occur, and in the ensuing fear and confusion could lead a resident to take violent measures in defense of his home.

IV. The remedy in this case is exclusion of all evidence discovered in the search of the Fields' home.

It has been said that the timing of a search of an occupied family home is "unquestionably ... 'a significant factor in determining whether in a Fourth Amendment sense, the search is unreasonable.'" Wayne R. LaFave, Search and Siezure § 4.7(b) at 590 (3rd ed. 1996) (quoting U.S. ex rel. Boyance v. Myers, 398 F.2d 896 (3d Cir. 1968) (holding a state nighttime search violated the Fourth Amendment where no showing was made of any necessity to conduct the search before the following morning)). This court has also recognized that principle. In fact, the requirement of probable cause to justify a nighttime search warrant, which was codified by this Court in N.D.R.Crim.P. 41(c)(1), has its roots in the state and federal constitutions. In the words of this Court, "rule 41 is designed to implement the provisions of Article I, Section 8, {former Section 18} of the North Dakota Constitution and the Fourth Amendment to the United States Constitution..." Explanatory Note to N.D.R.Crim.P. 41. This Court further emphasized Rule 41's constitutional foundations in Knudson, 499 N.W. 2d at 874, where the State argued that reasonable cause was not a prerequisite for a nighttime search. In rejecting that contention, the Court noted its "obvious Fourth Amendment implications." Id.

In this case the warrant did purport to authorize law enforcement to carry out the search during nighttime hours. However, the nighttime authorization was not supported by probable cause that there was any reason to search at night.

Furthermore, as previously noted, the Supreme Court of the United States has stated that evidence obtained as a result of an illegal search should be suppressed whether they are *direct or indirect* products of the search. Wong Sun, 371 U.S. 471, 484 (emphasis added). In this case it is arguable whether the evidence obtained in the May 15, 2003 search of Fields' home was an indirect or direct result of the products of his previously held illegal search. It is far more difficult to make an argument that it was neither. In order to protect Fields' right to be free from unreasonable searches and seizures under the Fourth Amendment of the United States Constitution and Article I § 8 of the North Dakota Constitution all evidence obtained in the May 2003 search should be suppressed.

IV. The good-faith exception to the exclusionary rule does not apply in this case.

Generally, the appropriate remedy for searches conducted in violation of the Fourth Amendment is suppression of the illegally obtained evidence, under the exclusionary rule. Weeks v. United States, 232 U.S. 383 (1914). Under the good-faith exception to the federal exclusionary rule, suppression is not the appropriate remedy if the police reliance on the search warrant was objectively reasonable. United States v. Leon, 468 U.S. 897 (1984). However, there are four situations when the good-faith exception does not apply because the officer's reliance "on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues" is not objectively reasonable. Id. at 922. Those four situations follow:

> (1)when the issuing magistrate was misled by false information intentionally or negligently given by the affiant; (2) when the magistrate totally abandoned her judicial role and failed to act in a neutral and detached manner; (3) when the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) when a reasonable law enforcement officer could not rely on a Facially deficient warrant."

State v. Utvick, 2004 ND 36, ¶26; 675 N.W.2d 387 (citing State v. Herrick, 1999 ND 1, ¶15; 588 N.W.2d 847 (citing Leon, 468 U.S. 897, 916)). "[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." Leon, 468 U.S. 897, 916. Therefore, if there is no police misconduct to deter, the good-faith exception must apply and suppression is not the appropriate remedy.

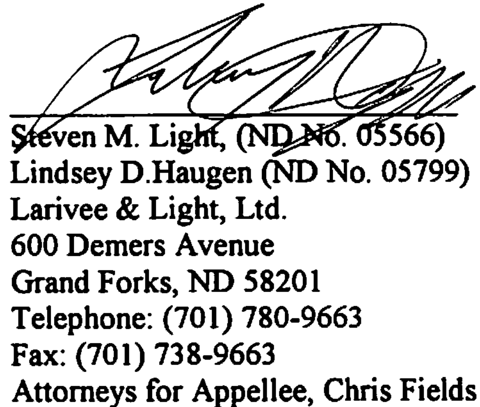
In the present case evidence of police misconduct is apparent. First, Officer Eissenmann's reliance on the warrant does not fit the general principle of the exclusionary rule, that reliance was not objectionably reasonable. Here the officer withheld a vital piece of information from the magistrate, namely that the information about drugs and guns was suppressed by the trial court and on appeal to this Court at the time. To say that an officer can present evidence to a magistrate that he knows, or at least should have known, has been suppressed by the court and by doing so can obtain a warrant in which his reliance is objectively reasonable goes against the very nature of both the exclusionary rule and its good-faith exception. Secondly, Officer Eissenmann's actions fit into the first exception to the exclusionary rule. The first exception applies when the magistrate was mislead intentionally or negligently by false information given by the affiant. Although it can be argued that technically officer Eisennmann did not offer false information to the magistrate, to do so would be absurd. Omitting a necessary fact is certainly akin to actually providing a misleading one. Whether Officer Eisenmann

did so intentionally or negligently is irrelevant. The simple fact is that Officer Eisenmann misled the magistrate by not notifying him that his "personal knowledge" had been garnered though an illegal search. To apply the good-faith exception to his conduct would be contrary to the terms and purpose of the exception.

CONCLUSION

For the above stated reasons, Appellee Chris Fields respectfully requests this court affirm the decision of the Honorable Benny Graff, Judge of the Morton County District Court, in granting Fields' motion to suppress evidence.

Dated this 10th day of June, 2004.



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