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IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20040037
District Court No. 30-03-K-01524

State of North Dakota, )
)
Plaintiff/ Appellant, )
)
-vs.- )
)
Christopher Ray Fields, )
)
Defendant/Appellee. )

FILED
IN THE OFFICE OF THE
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APR 12 2004

STATE OF NORTH DAKOTA

# BRIEF OF PLAINTIFF/APPELLANT

Appeal from the Morton County District Court
Opinion and Order Granting Defendant's Motion to Suppress Evidence,
dated January 13, 2004
Honorable Benny A. Graff, Presiding District Judge

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## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

## WHETHER THE LOWER COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE?

## STATEMENT OF THE CASE

## NATURE OF THE CASE, COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This appeal is from the lower court's order, granting the Defendant's motion for the suppression of evidence. The Morton County District Court, Honorable Benny A. Graff, presiding, by its memorandum opinion and order, dated January 13, 2004, granted the defendant's motion to suppress evidence seized in the execution of a search warrant at the defendant's residence on the evening of May 15, 2003. App. p. 10.

Evidence seized in the search revealed the presence of controlled substances and drug paraphernalia, resulting in a multi-count complaint alleging several violations of the Uniform Controlled Substances Act and the Drug Paraphernalia Act. App. pp. 4, 7. After the defendant's arraignment on the instant criminal counts, the defendant brought a pretrial motion for the suppression of evidence.

In his motion to suppress evidence, the Defendant argued that the magistrate issuing the search warrant impermissibly relied on "tainted evidence" that had been gleaned from an earlier, warrantless search of the defendant's vehicle, which also had been suppressed by the trial court, and which ultimately led to this Court's decision in State v. Fields, 2003 ND 81, 662 N.W.2d 242(N.D. 2003) [Fields I]. The "tainted information" from [Fields I] was alleged by the defendant in his motion to suppress, to be of such importance to the search warrant-issuing magistrate, as to constitute "fruit of the

poisonous tree" under the doctrine of Wong Sun v. United States, 371 U.S. 471, 485 (1963), Weeks v. United States, 232 U.S. 383 (1914), and other cases.

The State resisted the defendant's motion to suppress, and argued that there had been enough independent evidence related to the magistrate, at the May 13, 2003, probable cause hearing, separate and apart from the Fields I, "tainted information," to support a finding of probable cause to issue the search warrant, exclusive of the "tainted information" from Fields I.

The lower court conducted a hearing on the Defendant's motion to suppress evidence on December 2, 2003, at which time counsel for the parties argued their respective positions to the lower court. The lower court then took the matter of the Defendant's motion to suppress evidence under advisement.

On January 13, 2004, the lower court issued its memorandum opinion and order, granting the Defendant's motion for suppression of evidence, holding that:

> The evidence presented from the illegal search [from Fields I], so overwhelmed the garbage search that it is difficult to imagine the magistrate [the Honorable Bruce A. Romanick, District Judge for the South Central Judicial District] would have issued the search warrant if that had been the only evidence available. Based upon the foregoing, the motion to suppress is in all things granted.

Order Suppressing Evidence, p. 2. [parentheticals added.] App. p. 11.

Based upon the lower court's January 13, 2004, memorandum opinion and order, suppressing the State's evidence, the State filed its Notice of Appeal to the North Dakota Supreme Court, dated January 23, 2004. Along with its Notice of Appeal, the State filed the **Prosecuting Attorney's Statement Pursuant to Section 29-28-07(5) N.D.C.C.** The prosecuting attorney's statement asserted, among other things, that the evidence

suppressed constituted substantial proof of facts material to the pending criminal proceeding alleging violations of the controlled substances and paraphernalia acts. App. pp. 18-20.

## FACTS RELEVANT TO THE ISSUE PRESENTED FOR REVIEW

On May 13, 2003, Officer Ray Eisenmann, from the Metro Area Narcotics Task Force, appeared before the Honorable Bruce A. Romanick, testifying in support of a search warrant of the Defendant's residence and vehicle, located at 209 Fifth Avenue Northwest, in Mandan, Morton County, North Dakota. The search warrant sought the seizure of drugs and paraphernalia. App. p. 13.

In his testimony in support of the issuance of the search warrant, Officer Eisenmann began by telling the court that "early this morning between the hours of midnight and 1:00 a.m. Rob Fontenot with the Metro Area Narcotics Task Force and I did a garbage search at the residence of 209 Fifth Avenue Northwest. This would be where Chris Fields resides." Id.

Further fleshing out the record for Judge Romanick, Eisenmann elaborated on the fruits of the previous night's garbage search, when he revealed that "during the search we took three--a total of three bags from the garbage can, and brought them to the Mandan Law Enforcement Center. During the search we discovered five corner baggies with white residue powder, which one of them tested positive for cocaine." App. pp. 13, 14.

As if the information already relayed to Judge Romanick wasn't enough to support issuance of the search warrant, Eisenmann went on to tell Judge Romanick: "We came across three burnt tinfoilies, which are commonly used for smoking methamphetamine with, and we came across a broken up hanger -- excuse me, a hanger

that had been cut up with strong residue smell of marijuana on them. And they normally cut them up to use to clean out their marijuana pipes." Id.

Then, moving on to the vehicle Eisenmann sought permission to search, the officer related the following historical information to Judge Romanick, which Eisenmann knew from his prior dealings with the Defendant: "And the reason I'm asking to include the vehicle is, I have personal knowledge that Mr. Fields uses that vehicle to transport narcotics in it. He was arrested here last May, 2002. During a traffic stop he had a loaded handgun, over 7,800 dollars cash, cocaine, LSD, marijuana, and also meth paraphernalia. [Fields I] Id. [parenthetical added]

After Officer Eisenmann provided additional information to the court regarding the identity of the residents living at 209 Fifth Avenue Northwest, and the vehicle driven by the defendant, Judge Romanick approved issuance of the search warrant in the following words: "All right. I'll find there is probable cause to issue a warrant for the search of 209 Fifth Avenue Northwest." App. p. 16.

Upon the execution of the search warrant in the early morning hours of May 15, 2003, various items and substances alleged to be possessed in violation of the Uniform Controlled Substances Act and Drug Paraphernalia Act were found at the residence of the defendant. The seizure of that evidence led to the instant case alleging multiple counts in violation of the Chapter 19-03.1 N.D.C.C. [Uniform Controlled Substances Act] and Chapter 19-03.4 N.D.C.C. [Drug Paraphernalia Act] App. pp. 4, 7.

The Defendant brought a motion to suppress evidence, arguing among other things, that the information Eisenmann provided to Judge Romanick at the May 13, 2003, search warrant hearing, regarding the May, 2002, warrantless search of the Defendant's

vehicle was impermissibly "tainted evidence" that led to the Supreme Court's opinion in Fields I, supra. Because the "tainted evidence" from Fields I contaminated Judge Romanick's probable cause finding in issuing the search warrant, the Defendant urged suppression of all evidence seized by the police at the Defendant's residence on May 15, 2003. The State resisted the defendant's motion to suppress evidence. After the suppression hearing on December 2, 2003, the lower court issued its memorandum opinion and order, dated January 13, 2004, granting the defendant's motion to suppress all evidence gained from the May 15, 2003, search of the Defendant's residence. It is from that order suppressing evidence that the State now appeals, seeking reversal of the lower court's order suppressing evidence. App. pp. 10, 18.

## ARGUMENT

**THE LOWER COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUPPRESSION OF EVIDENCE AND SHOULD BE REVERSED BY THE COURT ON APPEAL.**

I. After excising any tainted information or "fruit of the poisonous tree" evidence arising from the May 28, 2002, stop and search of the defendant's vehicle, giving rise to the North Dakota Supreme Court's opinion in State v. Fields, 2003 ND 81,there was still ample probable cause for the magistrate to have issued the search warrant of the defendant's residence and vehicle on May 13, 2003.

In the lower court, the defendant sought the suppression of all evidence seized by law enforcement officers on May 15, 2003, in execution of the search warrant issued by Judge Romanick on May 13, 2003, based on the "**fruit of the poisonous tree**" doctrine

pronounced in Wong Sun v. United States, 371 U.S. 471, 485 (1963); going back to Weeks v. United States, 232 U.S. 383 (1914), and other cases. The garbage search testimony, as well as the admittedly "tainted testimony" or "fruit of the poisonous tree" evidence, is found at page two (2) of the May 13, 2003, transcript of the search warrant application before Judge Romanick. App. p. 14.

The "tainted testimony" reads, in its entirety: [Officer Eisenmann] **"And the reason I'm asking to include the vehicle is, I have personal knowledge that Mr. Fields uses that vehicle to transport narcotics in it. He was arrested here last May 2002. During a traffic stop he had a loaded handgun, over 7,800 dollars cash, cocaine, LSD, marijuana, and also meth paraphernalia."** Id.

In the lower court the Defense argued, in its motion to suppress evidence, that the above testimony, related to Judge Romanick by Officer Eisenmann, while true, was essentially unconstitutionally tainted "fruit of the poisonous tree" that had been previously suppressed by the trial court in an earlier case involving the same Defendant, Christopher Ray Fields, and was itself a case of suppression of evidence which eventually was affirmed on appeal by the North Dakota Supreme Court in State v. Fields, 2003 ND 81, 662 N.W.2d 242 (N.D. 2003) [Fields I.]

Notwithstanding the admittedly tainted information about the warrantless seizure of guns, drugs and money, suppressed in the earlier case of State v. Fields, supra, [Fields I,] but then related to Judge Romanick at the May 13, 2003, probable cause hearing, Officer Eisenmann also provided a substantial quantum of independently acquired, untainted evidence to the magistrate. Therefore, the untainted testimony regarding Eisenmann's May 13, 2003, garbage search of Fields' alley-side trash was in and of

itself sufficient for the magistrate to find probable cause to issue the search warrant for the defendant's residence. App. pp. 13, 14.

In the 1995 North Dakota Supreme Court case of State v. Johnson, 531 N.W.2d 275 (N.D. 1995), officers of the South Sakakawea Drug Task Force used evidence from a garbage search to support application for a search warrant of the defendant's premises, even though the application for the search warrant was made more than a month after the garbage search. The garbage search in Johnson, supra, revealed twenty-five (25) marijuana seeds [some capable of germination] and two bank deposit slips which contained Johnson's name. Id. at 277.

When State v. Johnson, supra, is compared to the instant case on appeal, it is striking to recognize that Officer Eisenmann had retrieved much more fresh evidence of illicit drugs and paraphernalia which had been found in the garbage search of the defendant's alley-side trash. The transcript of the probable cause hearing before Judge Romanick on May 13, 2003, reveals just how much evidence from the day's earlier garbage search was revealed to Judge Romanick when Officer Eisenmann testified: **"During the [garbage]search we took three - - a total of three bags from the garbage can, and brought them to the Mandan Law Enforcement Center. During the search we discovered five corner baggies with white residue powder, which one of them tested positive for cocaine. We came across three burnt tinfoilies, which are commonly used for smoking methamphetamine with, and we came across a broken up hanger - - excuse me, a hanger that had been cut up with strong residue smell of marijuana on them. And they normally cut them up to use to clean out their marijuana pipes."** App. pp. 13, 14.

The State in the instant case on appeal argues that Judge Romanick had much more evidence of illicit drugs and paraphernalia presented to the court from the May 13, 2003, garbage search than was presented to the magistrate in State v. Johnson, supra, where just a few marijuana seeds gleaned from a garbage search was held by the North Dakota Supreme Court to be sufficient to issue the search warrant in State v. Johnson, supra.

The Court held in State v. Johnson: "We believe the presence of the marijuana seeds in the garbage bag, which also contained bank deposit slips bearing Johnson's name, would warrant a person of reasonable caution to believe there was probably more marijuana inside Johnson's home." Id. at 279, also citing State v. Rydberg, 519 N.W.2d at 309.

The North Dakota Supreme Court went on to hold in State v. Johnson: "The marijuana seeds in Johnson's garbage bag supplied a sufficient nexus between Johnson's home and the probability of additional marijuana being found there." State v. Johnson, Id. at 279, and also citing State v. Erickson, 519 N.W.2d 555, 559 (N.D. 1993).

The State on appeal argues that State v. Johnson, supra, stands for the proposition that a garbage search, such as in the instant case on appeal, with an even closer proximity in time from garbage search to search warrant application than was existent in State v. Johnson, supra, becomes a sufficient quantum of untainted evidence for Judge Romanick to find probable cause to issue the search warrant for the Defendant's residence. App. pp. 13, 14.

Even if the admittedly "tainted testimony" provided by Officer Eisenmann, testimony based upon evidence which had been gained from the May, 2002, warrantless

search of the defendant's vehicle, is excluded from the court's consideration as "fruit of the poisonous tree" from the earlier case of State v. Fields, supra, [Fields I], there is still sufficient evidence to support a finding of probable cause to issue the search warrant, based upon the garbage search from May 13, 2003. Therefore, the lower court's suppression of the evidence obtained pursuant to the execution of the search warrant should be reversed by the Court on appeal.

Summarizing the State's argument on appeal, that the search warrant and its fruits should not be susceptible to suppression due to inclusion of the tainted information regarding the May, 2002, warrantless vehicle search that led to the ruling in State v. Fields, supra, [Fields I], the State resorts once more to the Court's holding in State v. Johnson, supra, where it was declared: "We give deference to the magistrate's factual findings on probable cause and will affirm, so long as there is a substantial basis for the conclusion that probable cause exists [to issue the search warrant]." Id. at 278, citing State v. Rydberg, supra.

In the instant case on appeal, the State argues that Judge Romanick had a substantial basis to conclude that the garbage search of May 13, 2003, presented in the context of an application to search the dwelling from where the trash originated, would in all probability yield additional evidence of drugs and paraphernalia in the Fields residence. Therefore, the State urges the court, in its review of Judge Romanick's finding of probable cause, to reach a like result as in State v. Johnson, supra, to separate the "tainted testimony" of Fields I, supra, from the lawfully acquired roadside trash-snatch evidence and in doing so, reaffirm the issuance of the search warrant by Judge Romanick

on May 13, 2003, by reversing the lower court's order suppressing the evidence obtained from the execution of that search warrant.

II. Any "tainted testimony" or "fruit of the poisonous tree" evidence from Fields I that was presented to the magistrate in support of the search warrant can be severed from the evidence presented to search the defendant's vehicle.

In the instant case, the "tainted testimony" presented to Judge Romanick by Officer Eisenmann, which would have been the "fruit of the poisonous tree" evidence presented from State v. Fields I, supra, is easily severable from the garbage search evidence used to support a probable cause finding by Judge Romanick to authorize the search of the Defendant's residence.

The "tainted testimony" or "fruit of the poisonous tree" that was presented to Judge Romanick on May 13, 2003, was presented to the court in the context of seeking authorization to search the defendant's vehicle, where Officer Eisenmann testified as follows: **"And the reason I'm asking to include the vehicle is, I have personal knowledge that Mr. Fields uses that vehicle to transport narcotics in it. He was arrested here last May 2002. During a traffic stop he had a loaded handgun, over 7,800 dollars cash, cocaine, LSD, marijuana, and also meth paraphernalia."** App. p. 14. See also, State v. Fields, supra. [Fields I]

It is clear from the context of Officer Eisenmann's testimony, that the information later challenged by defense counsel as "fruit of the poisonous tree," and which served as the lower court's basis to suppress evidence, is solely concerned with probable cause to search the defendant's vehicle, and not the defendant's residence. The State argues that the Court on appeal can easily separate the garbage search testimony to gain access to the

Defendant's residence from the "tainted testimony" or "fruit of the poisonous tree" evidence gained by law enforcement officers in State v. Fields I, supra, and which had been related to Judge Romanick by Officer Eisenmann to obtain judicial approval to search the defendant's vehicle.

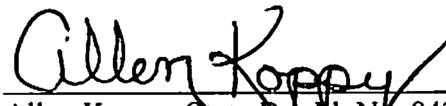
Therefore, the State on appeal argues that even though the admittedly "tainted testimony" gained from State v. Fields I, supra, can be characterized as "fruit of the poisonous tree" as it may apply to the Defendant, the lower court reversibly erred when it declined to sever the "tainted testimony" from the unassailably relevant garbage search evidence. Excising any tainted evidence presented to search the Defendant's vehicle from the garbage search evidence, there still remains sufficient probable cause gained from the street-side trash to support Judge Romanick's approval to search the defendant's residence, based upon the garbage search evidence and the rule from State v. Johnson, supra.

## CONCLUSION

In conclusion, the State on appeal argues that although the tainted evidence from State v. Fields I, supra, may not support probable cause to search the defendant's home and vehicle, the exclusion of the tainted evidence does not render the resulting warrant invalid. The State argues that the relevant issue for the court on appeal to determine is not whether the search warrant fails due to the inclusion of the admittedly tainted evidence into Judge Romanick's probable cause determination, but whether, putting aside all of the tainted testimony, the independent and properly obtained information resulting from the garbage search is sufficient to show probable cause to issue the search warrant for 209 Fifth Avenue Northwest, Mandan, North Dakota.

The State in the case on appeal argues that there remains enough good information for the Court on appeal to uphold Judge Romanick's finding of probable cause to issue the search warrant of the defendant's residence. See also, United States v. Giordano, 416 U.S. 505, 555 (1974) (Powell, J. concurring & dissenting). Therefore, the State urges the Court on appeal to reverse the order of the lower court, suppressing evidence.

Dated this 12th day of April, 2004.



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