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20040094

IN THE SUPREME COURT, STATE OF NORTH DAKOTA

State of North Dakota, Appellee, vs. Scott Norman Seglen, Appellant.	Supreme Ct. No. 20040094 **APPELLANT'S BRIEF**

ON APPEAL FROM A CRIMINAL JUDGMENT

DISTRICT COURT FOR GRAND FORKS COUNTY,
NORTHEAST CENTRAL JUDICIAL DISTRICT
HONORABLE LAWRENCE JAHNKE, JUDGE OF DISTRICT COURT, PRESIDING
Case No. 03-K-3193

SUBMITTED BY:

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Statement of Case

On November 8, 2003, Defendant Scott Norman Seglen, a 20 year-old Univerity of North Dakota student, entered the Ralph Engelstad Arena (hereinafter "REA") in Grand Forks, North Dakota with the intention of going to a UND Fighting Sioux hockey game. (A-5; Motion Tran. pg. 7, ll. 21-23; pg. 10, ll. 4-7) The REA is owned by the private charitable corporation, Arena Holdings Charitable, LLC. (A-8).

Scott entered through the student enterance of the REA and got in line. (A-5). At approx. 7:08 p.m., Scott's ticket was scanned and was immediately stopped by Officer Thomas Inocencio of the UND Police Department. (Motion Tran., pgs. 5-6, ll. 23-25, 1-11).

Officer Inocencio was on patrol at the REA to assist with security during the UND Fighting Sioux hockey game against the University of Minnesota Gophers. (Motion Trans, pg. 4, ll. 18-21; pg. 5, ll. 11-14). Officer Inocencio's duty that night was to monitor the student enterance. (Motion Tran., pg. 4-5, li. 25, ll. 1-5). It was his responsibility to "ensure that no outside beverages, weapons, anything prohibited from entering the facility". (Motion Tran. pg. 5, ll. 6-10).

After stopping Scott, Officer Inocencio commenced a pat-down search of Scott. (Motion Tran. pg. 10, ll. 20-25). As a result of the pat-down search, Officer Inocencio saw and felt a can. (Motion Tran. pg. 7, ll . 1-4.). While Officer Inocencio knew Scott was not caring a weapon, he still asked

Scott to remove the can from his pocket. (Motion Tran. pg. 7, ll. 1-7; pg. 11, ll. 2-7). Officer Inocencio had Scott remove the can because REA policy prohibited it in the facility. (Motion Tran. pg. 6, ll. 12-17). When Scott removed the container, Officer Inocencio determined it was a can of Coors Light beer. (Id., li. 12).

After verifying Scott's identity and age, Officer Inocencio cited him with Minor in Possession of an Alcoholic Beverage and asked Scott to leave the premises. (Motion Tran., pg. 7, ll. 14-25, pg. 8, ll. 9-13).

At the hearing on Scott's motion to suppress, Officer Inocencio testified that "our" policy that night was that anyone with an oversized jacket that came through the line was stopped and patted down. (Motion Tran. pg. 6, ll. 6-11). This resulted in "mostly everyone" being stopped and patted down. (Id., ll. 22-25). In Officer Inocencio's line, everyone was stopped that came through. (Motion Tran. pgs. 10-11, ll. 23-25, 1). He further testified that law enforcement also seizes non-alcoholic beverages from patrons, including pop and bottled water. (Motion Tran. pg. 11-12, ll. 20-25, 1) Officer Inocencio also testified that, prior to having the ticket scanners, signs were posted indicating that everyone was subject to search. (Motion Tran. pg. 9, ll. 9-18). However, the signs do not indicate that items seized could be used against them in a court of law. (Motion Tran. 11, pg. 11, ll. 8-12). The signs also do not state

that patrons waive their Constitutional rights by entering the building. (Id. ll. 13-16).

On February 3, 2004, the trial court issued a Memorandum Decision denying Scott's Motion to Supress and dismiss the case. (A-11). In the decision, the trial court upheld the search and cited no case law to support it's decision.

On March 3, 2004, Scott entered a conditional guilty plea to the charge of Minor in Possession of Alcoholic Beverage. (Plea Hearing, pg. 3, ll. 19-21). A condition of the plea was the right to appeal the trial court's decision on the suppression motion. (Plea Hearing, pg. 3, ll. 9-14; pg. 6, ll. 3-6). After sentencing, a Criminal Judgment was entered the same day. (A-13). Scott now appeals his conviction to this Court. (A-14).

Standard of Review

In reviewing a trial court's ruling on a motion to suppress, this Court will affirm the decision of the trial court, after resolving conflicting evidence in favor of affirming the decision, unless this Court concludes there is insufficient evidence to support the decision or the decision goes against the manifest weight of the evidence. State v. Leher, 2002 N.D. 171, ¶8, 653 N.W.2d 56. Questions of law are fully reviewable, and the ultimate conclusion of whether facts support a finding of reasonable and articulable suspicion is fully reviewable on appeal. Id.

Statement of Issue

I. WHETHER OFFICER INOCENCIO'S STOP OF SCOTT SEGLEN WAS REASONABLE UNDER THE FOURTH AMENDMENT AND THE SUBSEQUENT SEIZURE OF EVIDENCE PERMISSIBLE.

Argument

A. Officer Inocencio did not have "Reasonable and Articulable Suspicion" to Stop Scott Seglen and subject him to a Pat-down search.

"The Fourth Amendments of the United States Constitution, applicable to the states through the Fourteenth Amendment and Article I, Section 8 of the North Dakota Constitution, protect individuals from unreasonable searches and seizures." State v. Wanzek, 1999 N.D. 163, ¶7, 598 N.W.2d 811. (citing State v. Lanctot, 1998 N.D. 216, ¶5, 587 N.W.2d 568. "Warrantless searches are unreasonable unless they fall within a recognized exception to the requirement for a search warrant." Id. In this case, no dispute exists that this a warrantless search; hence, the State had the burden to show that this stop and search falls within one of the recognized exceptions to the warrant requirement.

Under the Fourth Amendment, a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." State v. Boline, 1998 N.D. 67, ¶25, 575 N.W.2d 906. In this case, Scott Seglen had just entered the REA and had his ticket

swipped. As with virtually every other individual who went through the student enterance that night, Scott was stopped by a law enforcement officer and immediately given at pat-down search. Under these circumstances, Officer Inocencio did more than simply approach Scott in a conversational matter in a public place. See Lapp v. N.D. Dept. of Transportation, 2001 N.D. 140, ¶8, 632 N.W.2d 419 (discussing community caretaking encounters). Scott's liberty was quite obviously restrained and a reasonable person would not feel in that situation that he could enter the facility without being stopped and frisked by the officer. "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Terry v. Ohio, 392 U.S. 1, 16 (1968). Given these facts, Officer Inocencio's encounter with Scott Seglen constitutes an investigative stop.

Under a Fourth Amendment "Terry stop", an officer must have a "reasonable and articulable suspicion of criminal activity" in order to justify an investigative stop. Boline, 1998 N.D. 67, ¶24. "Reasonable and articulable suspicion is less stringent than probable cause but requires more than a vague hunch." City of Grand Forks v. Egley, 542 N.W.2d 104, 106 (N.D. 1996). The objective standard for such a stop is "whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect potential criminal activity." Id. (quoting State v.

Hornaday, 477 N.W.2d 245, 246 (N.D. 1991). Furthermore, a law enforcement officer can only conduct a pat-down search when the officer "possesses an articulable suspicion that an individual is armed and dangerous." State v. Heitzmann, 2001 N.D. 136, ¶11, 632 N.W.2d 1 (quoting State v. Haverluck, 2000 N.D. 178, ¶22, 617 N.W.2d 652; Michigan v. Lona, 463 U.S. 1032, 1034 (1983)).

Clearly, a simple review of the facts reveals that their was absolutely no hint of criminal activity on the part of Scott. Like every other patron who came before him, the only thing that caused Officer Inocencio to stop and frisk Scott was the dubious distinction that he was wearing an "oversize coat" in November. In fact, even if Officer Inocencio saw an outline of a beverage container in his pocket before stopping Scott, this does not even constitute suspicion of criminal activity since a reasonable person would not believe a person entering a building with a beverage container in their pocket is commiting a crime. Arguably, this would even be the case, as it is here, where bringing outside beverages is prohibited by that buildings own policy.

Furthermore, when Officer Inocencio completed a pat-down search of Scott, he admitted he knew Scott was not carrying a weapon. (Motion Tran. pg. 11, ll. 5-7). Nevertheless, Officer Inocencio insisted that Scott remove the container from Scott's pocket on the basis that he was enforcing REA policy. (Motion Tran. pg. 6, ll. 12-17).

B. Officer Inocencio's action of Stopping Scott Seglen and subjecting him to a Pat-down Search is an Unauthorized Search and Seizure under Relevant Case Law.

While occasions of law enforcement being utilized in stopping and searching individuals at large events is rare, it is not unheard of. In those cases that have come before other courts, the conclusions reached have almost universally found such stops and searches to be unconstitutional. See LeFave, Searches and Seizures, §10.7(a).

In Jacobsen v. City of Seattle, the Supreme Court of Washington considered a case brought against the City of Seattle in a action brought under 42 U.S.C. §1983. 658 P.2d 653, 654 (Wash. 1983). In the case, three of the four plaintiffs were physically searched at a Grateful Dead concert held at the Seattle Center Coliseum on July 1, 1979 by members of the Seattle Police Department. Id. Among their complaints was that the police opened and inspected an unopened packs of cigarettes and even seized heart medicine from one plaintiff. Id.

In defending their action, the City argued that a "new" exception to the warrant requirement should exist for rock concerts. Id. at 656. The City argued that the search was analogous to those at courthouses and at airports. Id. The Court outright rejected the argument noting that the security situation at airports and courthouses is not comparable to a

rock concert. Jacobsen, 658 P.2d at 656. The Court noted that the security concerns at airports and courthouses arose out of terrorist attempts to bomb airports and courthouses, which is much greater justification to suspend the warrant requirement than the potential danger posed by an unruly concertgoer. Id. at 656-57 (quoting Wheaton v. Hagen, 435 F.Supp. 1134, 1145 (M.D.N.C. 1977). See also State v. Carter, 267 N.W.2d 385, 387 (Iowa 1978)(rejecting same analogy in Iowa case); Nakamoto v. Fasi, 635 P.2d 946, 953 (Hawaii 1981)(finding reliance on the analogy to be "misplaced").

In Scott Seglen's case, the danger posed by hockey fans, even if it the UND Fighting Sioux were playing the University of Minnesota Golden Gophers, was certainly not great as the danger of fans attending a rock concert. Furthermore, Officer Inocencio even admitted that the primary purpose was to prevent not only weapons, but outside beverages and anything prohibited from entering the facility. (Motion Tran. pg. 5, ll. 6-10).

Finally, the State will also likely argue, as before, that Scott Seglen "consented" to the stop and search by entering the facility despite the presence of signs in the lobby. An individuals consent to the search is indeed an exception to the warrant requirement.

However, "[t]o sustain a finding of consent, the State must show affirmative conduct by the person alleged to have consented that is consistent with the giving of consent,

rather than merely showing that the person took no affirmative actions to stop the police..." State v. Decoteau, 1999 N.D. 77, ¶11, 592 N.W.2d 579 (quoting State v. Avila, 1997 N.D. 142, ¶17, 566 N.W.2d 410). In the case at hand, Scott did nothing more then walk past the signs advising him of the prospect of being searched. This act of "implied consent" has repeatedly been rejected by other courts in similar cases. See LeFave, Searches and Seizures, §10.7(a).

In Collier v. Miller, the United States District Court for the Southern District of Texas held that stopping and searching individuals entering University of Houston's Hofheinz Pavilion and Jeppesen Stadium for "alcoholic beverages and cans and bottles of any kind" to be unconstitutional under the Fourth Amendment. 414 F.Supp. 1357, 1367 (S.D.Tex. 1976). In arriving at this holding, the Court considered and rejected the argument that the student had "impliedly consented" to being searched by entering the facility. Id. at 1366. In doing so, the Court found that a University could not condition public access to the facilities by claiming voluntary consent since "the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." Id. at 1366-67 (quoting United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, 282

U.S. 311, 328-29 (1931)). See also Nakamoto, 635 P.2d at 951-52 (relying upon same finding to arrive at same conclusion). Since Collier, courts have also utilized this same rational in rejecting these tactics even when signs are clearly posted. See Gaioni v. Folmar, 460 F.Supp. 10, 14 (N.D.Ala. 1978)(finding such consent to be "an inherent product of coercion"); Stroeber v. Commission Veteran's Auditorium, 453 F.Supp. 926, 933 (S.D.Iowa 1977)(finding such circumstances to be "marked by coercion and duress"); State v. Carter, 267 N.W.2d 385, 387 (Iowa 1978)(finding random searches, despite written and audio warnings of search, of individuals at rock concert to be unconstitutional). Under the "totality of circumstances" in Scott's case, it can scarcely be said that he voluntarily and freely consent to the search.

In reality, this case really revolves around the specious use of on-duty law enforcement personnel as "state-sponsored security guards" at a privately-owned arena. At the REA, Officer Inocencio and his colleagues were essentially acting as high-paid security guards and searching virtually every individual entering through the student enterance. However, the standards for a police officer, unlike those set for a security guard, are set forth by the Constitutions of the United States and the State of North Dakota, not Arena Holdings Charitable, LLC. The standards of utilized here do not meet constitutional muster.

C. **Officer Inocencio's action of stopping Scott Seglen and subjecting him to a Pat-down Search was not justified as a legitimate "checkpoint" as an Exception to the Warrant Requirement.**

In response to this case, it is anticipated that the State will argue that the "checkpoint" nature of the stop is permitted as an exception to the warrant requirement under the rational of State v. Albaugh, 1997 N.D. 229, 571 N.W.2d 345.

In Albaugh, this Court upheld the conviction of an individual who was stopped at a checkpoint set up by the North Dakota Game and Fish Department on N.D. Highway 200 near a probable hunting area. Id. In doing so, this Court utilized a three-part analysis to assess the reasonableness of the checkpoint stop which balanced "the State's interest in the checkpoint's purpose against the degree that the checkpoint advances that interest and the severity of the intrusion upon the individual's liberty." Id. at ¶7. If applied to the case at hand, the State has failed to meet any of the pegs of this three-part test.

Under the first part of this analysis, this Court must look at the importance of the public interest served by the checkpoint. Id. at ¶9. Presumably, the public interest for conducting a stop and pat-down search of virtually every individual who comes through the student enterance at the REA is for "security concerns". While it is reasonable to have

such concerns, the "determination of reasonableness requires balancing the public interest with the individual's right to personal security free from arbitrary infererence by police officers." Heitzmann, 2001 N.D. at ¶10. In this situation, taken as a whole, the needs of individual personal freedom is arbitrarily and unnecessarily interfered with by law enforcement when that individual must subject themselves to being stopped, without reasonable and articulable suspicion, and "felt-up" by a law enforcement officer in front of dozens of other individuals because the REA doesn't want outside beverages brought into their facility. In reality, these stops really do more to advance the interests of the REA by ensuring that individuals purchase their beverages inside the facility. Just as it is unconstitutional to set up roadblocks in honor of Burglary Prevention Week or to "curb the juvenile problem" so to is it unconstitutional to set up a checkpoint to keep outside beverages out of the Ralph Engelstad Arena. See People v. Gale, 294 P.2d 13 (Cal. 1956); Wirin v. Horrall, 193 P.2d 470 (Cal. App. 1948).

Under the second part of the test, the checkpoint should be an "effective means" in advancing the State's interest in providing security at the REA. See Albaugh, 1997 N.D. at ¶12. However, the State has wholly failed to show that in the case of the REA that this is an effective means, especially when you consider that it appears that these stop and pat-down searches occurred only at the student entrance. Furthermore,

there are clearly "less restrictive means" in providing security that conducting pat-down searches of every individual. In particular, the REA could require individuals to pass through metal detectors.

Under the final part of the test, the checkpoint's intrusion upon individual liberty needs to be considered. Albaugh, 1997 N.D. 229, ¶14. Generally, in motor vehicle cases, checkpoints only minimally intrusive on individuals physically as well as psychologically. Id. at ¶¶14-15. However, in this case, Scott along with everybody else in Officer Inocenio's line was subjected to far more than being stopped and asked a couple of questions. They were stopped and given a pat-down search in front of other hockey fans. Obviously, these searches are much more physically intrustive than those at motor vehicle checkpoints.

In addition, since it is more physically intrusive and in a more public setting, the likelihood that such searches could cause an individual to feel psychologically intrusion would logically be much greater. In Albaugh, this Court noted that the considereation of the level of psychological intrusion in this balancing test is lessened by the degree of discretion individual officers have in conducting the checkpoints. Id. at ¶16. However, unlike in Albaugh, the discretion given to officers in conducting searches at the student enterance at the REA was apparently quite broad. No evidence of a comprehensive policy (or even a written one for

that matter) directing these searches has been presented. No evidence that the State's Attorneys office had been obtained prior to conducting these stop and pat-down searches. Even Officer Inocencio's statement that "our policy that night was..." helps demonstrate the arbitrary nature of the guidelines the officers were following. (Motion Tran. pg. 6, li. 6). While an exception for warrantless stoping of motor vehicles at checkpoints exists under the Fourth Amendment, such an exception should not exist when the rules for the searches are promogated by a limited liability company.

Conclusion

Based upon the above stated law and reasoning, Appellant Scott Seglen requests that the Judgment of Conviction entered by the Grand Forks County District Court be in all things **REVERSED** and that this case be remanded to the district court with instructions to dismiss the case.

Dated: This the 9th day of July, 2004.

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