ORIGINAL

20040094

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The State of North Dakota,)
)
Plaintiff and Appellee,)
)
vs.)
)
Scott Norman Seglen,)
)
Defendant and Appellant.)

Supreme Court No. 20040094

District Court No. 18-03-K-3193

ON APPEAL FROM CRIMINAL JUDGMENT
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE LAWRENCE JANKE, PRESIDING.

BRIEF OF APPELLEE

David T. Jones #03581
Thomas H. Falck, Jr. #03216
Assistant States Attorneys
Grand Forks County
P.O Box 5607
Grand Forks, ND 58206
(701) 780-8281

Kelly D. Crammer
Senior Legal Intern
Grand Forks County
P.O. Box 5607
Grand Forks, ND 58206
(701) 780-8281

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

Scott Norman Seglan, Defendant and Appellant herein, appeals from a judgment of criminal conviction, entered against him March 3, 2004 after his conditional plea of guilty, entered that same day. The State of North Dakota, Appellee in this action, respectfully requests that this Court Affirm the District Court's decision in denying the Defendant's Motion to Suppress.

On November 8, 2003, Officer Tom Inocencio of the University of North Dakota Police Department was on security patrol before a Fighting Sioux hockey game, taking place that evening at the Ralph Englestad Arena (REA or Arena). (Appellee's Appendix, hereinafter "App.," pp. 2-3). The hockey game featured the University of North Dakota against the University of Minnesota and brought with as its guests, the Governors of both states. Id. As security patrol at the student entrance of the Arena, the policy was to ensure that no weapons, outside beverages, or other prohibited items were brought into the building. Id. Clear signs notifying entrants that they would be "Subject To Search" adorned the entrance and uniformed officers such as Officer Inocencio assisted in the security patrol. (App. pp.7, li. 9 - p.8, li. 6). The large rivalry between the two schools had caused violations of REA policy in the past, with students bringing in everything from outside alcoholic beverages to dead gophers to later throw onto the ice. (App. pp.10, ll. 3-12). The exceptionally large crowd, as well as the presence of the Governors, were cited as reasons for the increased concern for ensuring the exclusion of the prohibited items. Id.

While patrolling the student entrance, Officer Inocencio observed the Defendant Scott Seglan. (App. pp. 4, ll. 1-2). Mr. Seglan was wearing an oversized coat, which REA security determined to be a common method for concealing prohibited items. (App. pp.4, ll. 6-11). For policy and security reasons, Officer Inocencio initiated a brief pat-down of Mr. Seglan as he came through the entrance line. Id. At substantially the same time that he initiated the pat-down search, Officer Inocencio noticed a "bulge" under the Defendant's jacket and suspected it to be a prohibited outside beverage, against REA policy. (App. pp.4, ll. 13-21). Upon asking Mr. Seglan to remove the prohibited beverage, Mr. Seglan removed a can of Coors Light beer. (App. pp.5, ll. 3-12). Noticing that Mr. Seglan did not appear to be twenty-one years of age, the officer asked for identification and learned that Mr. Seglan was in fact under the legal drinking age. (App. Pp.5, ll. 14-23). Officer Inocencio cited Mr. Seglan for Minor in Possession of Alcohol. (App. pp.6, ll. 11-13). At the Defendant's suppression hearing, he argued that while it was perfectly acceptable to search individuals entering the facility, the fruits of any search should not be able to become evidence in a prosecution. (App. pp.10, li. 24 - p.11, li. 8). By Memorandum Decision on February 3, 2004, the district court, Honorable Judge Lawrence Jahnke, denied Defendant's motion for suppression, finding that the circumstances of the event and the interests in security made the search reasonable under the Fourth Amendment. (App. pp. 20-21). Defendant entered a conditional plea of guilty on March 3, 2004 and now appeals the criminal judgment entered against him, arguing the search itself was unreasonable. (App. pp. 19, ll. 19-21).

STATEMENT OF THE ISSUE

Whether The District Court Properly Denied The Defendant's Motion To Suppress Evidence Where The Search Was Reasonable Under Applicable Fourth Amendment Standards.

LAW AND ARGUMENT

The District Court Properly Denied The Defendant's Motion To Suppress Evidence Where The Search Was Reasonable Under Applicable Fourth Amendment Standards.

The totality of the circumstances facing Officer Tom Inocencio, on security patrol for the REA, warranted the brief and minimally-intrusive search conducted upon the Defendant, and the resulting evidence was therefore properly admitted in the District Court. Where the circumstances of the evening demanded inspection of entrants, Defendant had been given notice that he would be subject to search, he then entered the building and submitted to a visual scan and brief pat-down search, and then voluntarily handed over the subject evidence to the officer, the search, although warrantless, and the resulting evidence, were properly upheld.

The standard of review on appeal of a motion to suppress is well established. A reviewing court "will defer to a trial court's findings of fact in the disposition of [the] motion." State v. Wanzek, 1999 ND 163, ¶ 5; 598 N.W.2d 811, 813. In Wanzek, this court explained that a reviewing court will refuse to reverse 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." Id. This Court added that, "[w]hile we defer to the trial court's findings of fact, questions of law are fully reviewable." Id.

In the case at hand, the district court properly admitted the evidence obtained in the search of Defendant, and the State respectfully requests the decision be upheld.

I. The Search of Defendant Was Valid Under The "Reasonable Search" Exception To The Warrant Requirement.

Because the brief and minimally-intrusive search of Defendant was a known condition of his entry into the Arena, and due to the increased public concern and demand for the safety of patrons, the officer's seizure of the evidence was constitutionally permissible. The Fourth Amendment to the United States Constitution, and Article I, Section 8 of the North Dakota Constitution, protects individuals from only those searches and seizures which may be deemed unreasonable. See State v. Wanzek, 199 N.D 163, ¶ 7; 598 N.W.2d 811, 813. While warrantless searches are presumed unreasonable, recognized exceptions to the warrant requirement have been found to include a "'reasonable search' exception such as those conducted at airports and courthouses." Jensen v. Pontiac, 317 N.W.2d 619, 621 (Mich. App. 1981); see also State v. Rexroat, 966 P.2d 666 (Wash. 1998) (upholding courthouse entry search as consensual and upholding criminal defendant's conviction for possession of controlled substance).

The application of a "reasonable search" exception to such pre-admittance searches as the one at issue in this case will be an issue of first impression in the State of North Dakota. While the issue was debated and rejected in a few federal district court cases in the late 1970's, such as those cited by the Defendant, the change in times and today's heightened concern for safety and security calls for an extension of the law with regard to these pre-admittance searches. It is the position of the State that this is a much needed and highly justified extension, based on the heightened concern for safety and security in our country. With the threat to public safety higher than ever, the need for the

ability of law enforcement to briefly scan or search entrants to a large facility warrants searches such as those in the case at hand. Additionally, while the application of a "reasonable search" exception to pre-admittance searches will be of first impression in North Dakota, the Washington Court of Appeals did apply it in the 1981 case of Jensen v. Pontiac. 317 N.W.2d 619 (finding constitutionality in search done as condition of entrance to professional football game).

In Jensen, plaintiffs brought a civil suit to contest the constitutionality of a stadium's search of patrons attending a professional football game. Id. at 621. The Michigan Court of Appeals applied a three prong analysis in determining the constitutionality of the pre-admittance searches. Id. The court found the three factors to be considered to include, "(1) the public necessity, (2) the efficacy of the search, and (3) the degree and nature of the intrusion involved." Id. at 622. Based on their application of these three factors, the Michigan court determined that the pre-admittance searches were constitutionally permissible.

1. Public Necessity Demands Brief, Minimally-Intrusive Searches Of Entrants.

The protection of patrons to large facilities and arenas, such as the REA, is a justifiable basis for the implementation of pre-admittance searches. The Michigan Court of Appeals explained in Jensen v. Pontiac that "the matter of public necessity can be evaluated by examining the nature of the threat to public safety involved and the likelihood that such a threat will materialize." Id. at 623-624. In Jensen, the Court recognized that the stadium sought to protect patrons from potentially fatal injuries

caused by prohibited items being brought in and thrown within the stadium. Id. The stadium also cited, as a secondary purpose, the prevention of outside beverages, which would violate their liquor license, from being brought onto the premises. Id. The Michigan court determined that the need to protect patrons at a public stadium was a valid basis for upholding the search. Id.

As in Jensen, the searches conducted at REA, and that which the Defendant was subjected to, are done in an effort to protect patrons within the Arena. On the evening in question, the hockey game not only brought to town a large and long held rivalry and the fans who attended, but the Governors of both Minnesota and North Dakota as well. (App. pp.3, ll. 13-22). With the knowledge that the rivalry had produced REA policy violations in the past, the facility sought to ensure that prohibited items were excluded from the facility. (App. pp.10, ll. 3-12). In denying Defendant's Motion to Suppress, District Court Judge Lawrence Jahnke cited the security concerns as one basis for upholding the reasonableness of the search. (App. pp. 21, ll. 9-11). Prohibiting brief and minimally-intrusive searches of patrons such as the Defendant would cripple REA's ability to protect its patrons not only from prohibited beverages, (not only consumed against REA policy, but potentially thrown within the stands), but any weapons or potentially dangerous objects which a patron might attempt to throw onto the ice during an event. As the court in Jensen found a public necessity regarding its football game patrons, necessity exists with regard to REA's patrons as well.

2. The Efficacy Of The Search Is Justifiable.

The search procedures implemented by the REA and executed by Officer Inocencio are valid procedures for excluding the prohibited items and deterring the dangers sought to be protected. Where the likelihood that the search procedure will avert the harm protected against is established, the procedure will be justifiable. See Jensen, 317 N.W.2d at 624. Further, the Michigan court stated that a trial court need not find a defined threshold of effectiveness, but must only establish the existence of such. Id. In Jensen, the Court found that the non-discretionary nature of the searches implemented at the stadium, which required every patron to submit to visual searches of persons and their property, were likely to be effective in averting the potential harm. Id.

Similarly, in the case at hand, the searches implemented at REA are an efficient means of excluding prohibited items. All patrons are observed as they enter the Arena, and those with clothing capable of concealing prohibited items are subjected to a brief pat-down of the outside of their clothing. (App. pp.4, ll. 6-11). Additionally, Defendant's suggested "less-restrictive alternative" of requiring patrons to pass through metal detectors would likely not be as effective in excluding some of the prohibited (yet non-metal) items, such as, for example, dead gophers. The procedure as implemented is an efficient means of achieving protection of REA patrons and is justifiable on that basis.

3. The Search Of Entrants Is Brief And Only Minimally Instrusive.

The nature of the search of entrants at REA is not sufficiently intrusive so as to outweigh the public necessity which demands it. In Jensen, the Michigan court examined the policy implemented there and determined it to be sufficiently brief and unintrusive so as to justify its implementation. Id. at 624-625. The policy at issue in Jensen required that entrants be subject to a visual search, meaning that the patrons themselves were inspected visually and any containers or bags observed by security would have to be opened by the patron and inspected by the guards. Id. at 624. Patrons could be asked to remove items so as to facilitate the visual inspections. Id. The court noted that the entire inspection at issue in the case lasted approximately 15-20 seconds. Id. at 620. In finding the searches only minimally intrusive, the Jensen court distinguished itself from previous cases which had struck down such pre-admittance searches and stated that the policy's purpose of protecting the public potentially permitted more intrusive means than would be allowed by a policy sought to enforce drug or alcohol laws. Id. at 624. (citing and distinguishing Collier v. Miller, 414 F. Supp. 1357 (S.D. Tex. 1976); Wheaton v. Hagan, 435 F. Supp. 1134 (M.D. N.C. 1977); Stroeber v. Comm. Veterans Auditorium, 453 F. Supp. 926 (S.D. Iowa 1977); Gaioni v. Folmar, 460 F. Supp. 10 (M.D. Ala. 1978)). The Jensen court also noted that, while it refrained from relying on a "consent search" exception, the fact that entrants were notified that they would be searched, and then voluntarily entered the search area, mitigated the offensiveness of the procedures. Id.

Similarly, the searches conducted in the case at hand are brief and only minimally intrusive. As in Jensen, REA patrons are notified by posted signs that "For [Their]

Safety," they will be "Subject to Search," upon entering the facility. (App. pp.7, ll. 14-23). Additionally, such searches are a matter of common knowledge among the campus population. Id. Upon entering, patrons are observed by security. (App. pp. 8, li. 15-19). As was the case of the Defendant, entrants wearing oversized jackets are subjected to a further pat-down search to avoid intentional concealment of prohibited items. (App. pp.4, ll. 6-11). The process was brief and consisted of a pat-down of the outer layers to obtain a feel for prohibited items. Id. Based on these circumstances, the privacy expectations of the Defendant were sufficiently lowered by the posted signs and the uniformed officer executing the searches. Additionally the brief pat-down was not sufficiently intrusive so as to warrant its exclusion.

While the pat-down search is admittedly a step beyond the visual inspections implemented in Jensen, they are but an extension of the visual observations, justified by patrons' ability to conceal items in oversized clothing and the facility's heightened need to protect not only hockey game patrons, but the Minnesota and North Dakota Governors as well. And while the Jensen court found comfort in the stadium's use of security guards rather than armed or uniformed officers, the safety and security concerns facing large arena facilities today requires the use of sufficiently prepared and trained officers.

While Appellant relies heavily on cases such as Jacobson v. Seattle and Collier v. Miller, those cases are distinguishable from the case at hand. Jacobson, 658 P.2d 653 (Wash. 1983); Collier, 414 F. Supp. 1357 (S.D. Tex. 1976). While the searches in Jacobson consisted of intensely intrusive pat-down searches of rock concert patrons, such is not the case here. There is nothing in the record to indicate that the pat-down initiated

on the Defendant, or other REA entrants, rose to the level of intrusiveness as was witnessed in Jacobson. Because the intensely intrusive nature of the searches in Jacobson was a primary deciding factor for that court in finding the searches impermissible under the "reasonable search" exception, that case is distinguishable from the case at hand on that basis. Jacobson, 658 P.2d at 672-673 (citing Jensen v. Pontiac, as an example of a minimally intrusive visual inspection in contrast to the physical pat-down employed there, which involved officers forcibly seizing containers and searching them).

Additionally, while the Jacobson court refused to analogize the situations at rock concerts with the dangers posed at airports and courthouses (places most commonly associated with the "reasonable search" exception), that basis is arguably much less true today than in 1983, when Jacobson was decided. The country's heightened demand for safety and security, coupled with the evening's presence of the Minnesota and North Dakota Governors, created a situation which sufficiently justified the need for the pre-admittance searches employed in this case.

Further, this case is distinguishable from both Jacobson and Collier on the basis that neither case involved the use of signs to notify entrants that they were subject to search. In fact, both cases state that the use of such notices and signs, had they been employed, may have been a mitigating factor in determining the reasonableness of the searches examined in those cases. Jacobson, 658 P.2d at 675; Collier, 414 F. Supp. at 1366 (striking down pre-admittance searches at rock concerts). As distinguished from those cases, the REA did employ the use of signs to notify entrants that they would be subject to search. Also, while Jacobson and Collier refused to apply a "consent search"

exception to pre-admittance searches, a finding of consent is not essential in the case at hand because a balancing of the three factors identified in Jensen v. Pontiac indicates that the search was reasonable based on public necessity. See Jensen, 317 N.W.2d 619; see also State v. Rexroat, 966 P.2d 666 (upholding courthouse entry search as consensual and upholding criminal defendant's conviction for possession of controlled substance).

II. Defendant Voluntarily Produced The Subject Evidence.

Even if the Court finds that the search initiated upon Mr. Seglan was not justifiable under the "reasonable search" exception, the evidence produced therefrom should not be the subject of suppression, as the Defendant produced such for the officer voluntarily. "In determining whether or not the accused voluntarily consented to the search and seizure, [a reviewing court will] look to the totality of the circumstances in each individual case." State v. Metzner, 244 N.W.2d 215, 221 (N.D. 1976) (citing Schneckloth v. Bustamante, 412 U.S. 218 (1973)). In Metzner, this Court upheld the admission of evidence produced voluntarily by the Defendant upon a request by questioning officers. Id.

The facts of that case show that during a burglary investigation, Bismarck Police Officers knocked on the door of Russell Metzner. Id. at 218. Officers questioned Metzner as to whether he had been out that evening and then asked him to produce the boots he had been wearing. Id. The Defendant produced the boots and officers determined them to be identical to prints left at the scene. Id. On his appeal of the district court's denial of his motion to suppress the boots, this Court upheld the lower

court's decision, finding that the defendant's production of the boots was free, voluntary, and free from police coercion. Id. at 222. This Court noted that in evaluating the totality of the circumstances of the case, there was no evidence of inherently coercive tactics, either in the questioning or the environment in which it took place. Id. at 222-223; (citing U.S. v. Watson, 423 U.S. 411 (1976) in support of proposition that custody alone did not demonstrate a coerced confession or consent).

As in Metzner, Defendant voluntarily produced the contraband which he seeks to suppress. (App. pp.5, ll. 3-10). The facts on this issue are not in dispute. Upon Officer Inocencio simultaneously seeing the "bulge" in Mr. Seglan's jacket and performing a light pat-down which confirmed the object's presence, Officer Inocencio requested that Mr. Seglan remove the item from his jacket. Id. He did not reach into Mr. Seglan's jacket and remove the prohibited item himself, but requested Mr. Seglan do so. Id. Mr. Seglan had been put on notice that he would be searched, and could at the time of the request have turned and left or even refused the officer. Had Mr. Seglan refused, he likely would not have been admitted into the Arena, but that alone cannot support an accusation of explicit or implicit coercion. See Jensen, 317 N.W.2d 619 (Mich. App. 1981) (upholding searches under "reasonable search" exception where refusal of search resulted in exclusion from stadium). Had Mr. Seglan been turned away for his refusal, he arguably could simply have removed the object and then returned for admittance. This is not a situation in which Mr. Seglan would have been banned from the facility or chased down in order for the officer to determine criminal activity. The request for Mr. Seglan to remove the item was based on the officer's belief that it was a prohibited can, and the

officer's knowledge that "regardless of the nature of the can, it was prohibited from coming in." (App. pp.5, ll. 3-7). As Officer Inocencio himself stated at the suppression hearing, other prohibited items were simply removed from entrants who were then allowed to enter. (App. pp.9, li. 22 - p.10, li. 1).

In the case at hand, Mr. Seglan's production of the beer can from the inside of his jacket was a voluntary response to a request by Officer Inocencio. Further, there is nothing in the record to indicate the use of any coercive tactics by the officer. Based on these facts, and in light of relevant case law, the Defendant's voluntary production of the beer can warrants affirmance of the District Court's decision. Suppression is avoided on the basis of the Defendant's voluntary production of the can of beer with which he was charged.

CONCLUSION

Based on the foregoing law and argument, the decision of the District Court in Denying Defendant's Motion to Suppress was proper. There exists today a public necessity to search entrants of such large facilities, only increased by the circumstances as they existed on the evening in question, as well as to ensure the safety of the patrons attending. The procedures involved are efficient and not overreaching, and the nature of the intrusion is brief, minimal, and done pursuant to a lowered expectation of privacy. Based on these factors, and the public policy concerns for permitting such searches, admission of the evidence was proper.

Alternatively, even if this Court determines that the search initiated upon the Appellant was not reasonable, any offensiveness of the pat-down search is cured by the Defendant's own voluntary production of the subject evidence.

THEREFORE, the State respectfully requests this Court AFFIRM the decision of the District Court in denying Defendant's Motion to Suppress.

DATED this 4th day of August, 2004.

Kelly D. Crammer
Senior Legal Intern

Thomas H. Falck, Jr. (#03216)
For : David T. Jones (# 03581)
Assistant States Attorney
Grand Forks County
State of North Dakota

20040094

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court #20040094
	)	Case #18-03-K-03193
Plaintiff,	)	
	)	
vs.	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
Scott Norman Seglen,	)	
	)	
Defendant.	)	

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

AUG 11 2004

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age and a resident of Grand Forks County, North Dakota, being first duly sworn deposes and says that on the 11th day of August, 2004, she enclosed in envelopes true copies of the following documents:

BRIEF OF APPELLEE
APPENDIX OF APPELLEE

and that she addressed and deposited said envelopes, with the contents therein, in the U.S. Mails at Grand Forks, North Dakota, postage prepaid to the following:

Larry Richards
Attorney at Law
711 N Washington Street #202
Grand Forks, ND 58203

State's Attorney's Office

Subscribed and sworn to before me this 11th day of August, 2004.

Notary Public

SA#000000083066
I:\sams\18040186.184

CHERYL VERGAL
NOTARY PUBLIC STATE OF NORTH DAKOTA
My Commission Expires June 19, 2008