

ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20040292

State of North Dakota,)	
)	
Plaintiff-Appellee,)	Supreme Court No. 20040292
)	District Court No. 09-03-K-00792
vs.)	
)	
Michelle Renae Driscoll a/k/a)	
Michelle Pricilla Driscoll,)	
)	
Defendant-Appellant.)	
_____)	

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAR 9 2005

STATE OF NORTH DAKOTA

APPEAL FROM ORDER OF THE TRIAL COURT DENYING MOTION FOR
NEW TRIAL DATED OCTOBER 18, 2004; CRIMINAL JUDGMENT AND
COMMITMENT DATED OCTOBER 18, 2004; AND FROM ORDER
DENYING MOTION TO SUPPRESS, DATED OCTOBER 13, 2003
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE GEORGIA DAWSON, PRESIDING

APPELLEE'S BRIEF

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ISSUES PRESENTED

- I. The search warrant contained sufficient information to establish probable cause for its issuance.
- II. The scope of the search warrant extended to the Defendant's purse.
- III. The trial court correctly denied Defendant's motion for new trial.

STATEMENT OF THE CASE

On March 6, 2001, narcotics officers from the Fargo Police Department executed a search warrant at a residence in South Fargo. Based on evidence obtained from the search, the State charged the Defendant with the following offenses:

- 1) Possession of a controlled substance (methamphetamine) with intent to deliver, a class A felony,
- 2) Possession of a controlled substance (methamphetamine), a class C felony,
- 3) Possession of a controlled substance (over 1 ounce of marijuana), a class C felony, and
- 4) Possession of drug paraphernalia, a class C felony.

After a motion hearing on September 17, 2003, the trial court denied the Defendant's motion to suppress. The Defendant filed two motions to reconsider the motion to suppress which the trial court denied. On May 4, 2004, a twelve-person jury convicted the Defendant of all four offenses. The Defendant appeals claiming there wasn't probable cause for the issuance of the search warrant, the scope of the search warrant did not extend to the Defendant's purse, and the trial court erred in denying its motion for a new trial based on newly discovered evidence.

STATEMENT OF FACTS

On March 6, 2001, narcotics officers from the Fargo Police Department executed a search warrant at 1444 32nd Street Southwest, Apartment 210, in Fargo, North Dakota. (Transcript of Trial (Tr.) of 05/03/04 at p. 32-3). The search warrant contained the following information:

1. On February 20, 2001, a confidential informant (CI) arranged to buy three and one-half (3.5) grams of cocaine from a person named Jack Williams for two hundred fifty dollars (\$250.00). (Appellant's Appendix at p. 9-12). Williams collected the money from the CI and went to 1444 32nd Street Southwest in Fargo to get the cocaine. Id. Williams called the CI from the residence and said the seller now wanted more money for the cocaine. Id. The caller identification on the CI's telephone showed the call came from apartment number 210. Id. That apartment belonged to Scott Alan Olson. Id. The law enforcement computer system showed Olson had been named as being involved in cocaine trafficking in the Fargo/Moorhead area. Id. Williams left the residence with the cocaine and subsequently delivered the cocaine, approximately three and one-half (3.5) grams, to the CI. Id.

2. On March 6, 2001, the CI again arranged to buy cocaine from Jack Williams. Id. The CI gave three hundred twenty-five dollars (\$325.00) to Williams and Williams returned to 1444 32nd Street Southwest in Fargo. Id.

Williams walked into the apartment building, stayed for approximately ten (10) minutes, and left the building. Id. Williams then met with the CI and delivered the cocaine. Id.

East Central Judicial District Judge Cynthia Rothe-Seeger signed the Warrant on March 6, 2001. The same day, officers executed the search warrant (Tr. at 32-3). As they entered, officers observed the Defendant moving quickly through the hallway attempting to flush a large quantity of methamphetamine down the toilet. (Tr. at 33-4). The Defendant aggressively threw baggies of methamphetamine in the toilet while also attempting to shut the bathroom door so officers could not enter. (Tr. at 34, line 10-12). Officers subsequently found over seventy eight (78) grams of methamphetamine in and around the toilet. (Tr. at 38, lines 22-5).

The Defendant, who was in her pajamas, was handcuffed and taken into a nearby bedroom. (Tr. at 40-1). Detective Dan Hudson, who worked for the Fargo Police Department at the time, told the Defendant he saw her throwing methamphetamine into the toilet and the Defendant said "I know." (Tr. at 42, line 8-11). Although the Defendant was not on the lease, she had a purse, a computer, and some clothes at the apartment. (Tr. at 41, lines 20-21). Officers placed the Defendant under arrest and took her to the Cass County Jail. (Tr. at 43, line 6-7).

Officers searched the east nightstand in the master bedroom of the

apartment and found a gram scale, several ounces of “cut,” 2.6 ounces of marijuana, various small “Ziploc” baggies, four hundred sixty-five dollars (\$465.00) cash, and a check for four hundred fifty dollars (\$450.00). (Tr. at 44-7, Tr. at 99, lines 17, 20). “Cut” is a substance added to narcotics to dilute the original quantity so there is more narcotics to sell. (Tr. at 49, lines 10-4).

When Sergeant Steve Lynk of the Fargo Police Department entered the master bedroom, he saw an open purse on the bed. (Tr. at 86, lines 15-7). Sergeant Lynk saw large bundles of money inside the purse. (Tr. at 87, lines 20-1). The purse contained two thousand six hundred sixty-five dollars (\$2,665.00) in cash. (Appellant’s Appendix at 13). Sergeant Lynk testified, based on his training and experience, he believed this money to be drug proceeds. (Tr. at 95, lines 18-9). The purse also contained a film container with methamphetamine, an advertisement for scales, a notebook, and some letters. (Tr. at 89-92). Sergeant Lynk testified the notebook contained what he believed to be “pay-owe” sheets used to keep track of drug transactions. (Tr. at 96). He also testified the scales on the advertisement in the purse were the kind typically used by drug dealers to weigh drugs. (Tr. at 97, lines 8-13). The Defendant’s driver’s license, birth certificate, and credit cards were also found in the purse. (Tr. at 93, lines 8-13).

Officers arrested and charged the Defendant with possession of a controlled substance (methamphetamine) with intent to deliver, possession of a controlled

substance (methamphetamine), possession of a controlled substance (marijuana),
and possession of drug paraphernalia.

ARGUMENT

I. The search warrant contained sufficient information to establish probable cause for its issuance.

When reviewing a trial court's ruling on a motion to suppress, this Court "review[s] the sufficiency of the information before the magistrate independent of the trial court's decision and use[s] the totality-of-the-circumstances test." State v. Roth, 2004 ND 23, ¶5, 674 N.W.2d 495. "Although each bit of information . . . , by itself, may not be enough to establish probable cause and some of the information may have an innocent explanation, 'probable cause is the sum total of layers of information and synthesis of what the police have heard, what they know, and what they observed as trained officers . . . which is not weighed in individual layers but in the 'laminated' total.'" Roth at ¶5, (quoting State v. Damron, 1998 ND 71, ¶7, 575 N.W.2d 912). "'Whether probable cause existed to issue a search warrant is a question of law'" fully reviewable by this Court. Roth at ¶5 (quoting State v. Theiling, 2000 ND 106, ¶8, 611 N.W.2d 861. This Court "generally defer[s] to a magistrate's determination of probable cause if a substantial basis for the conclusion exists, and doubtful or marginal cases are resolved in favor of the magistrate's determination." Roth at ¶6.

To issue a search warrant, there must be probable cause. State v. Guthmiller, 2002 ND 116, 646 N.W.2d 724. "Probable cause to search exists if it is established that certain identifiable objects are probably connected with criminal

activity and are probably to be found at the present time at an identifiable place.”

Roth at ¶7 (quoting State v. Ringquist, 433 N.W.2d 207, 212 (N.D. 1988)).

“Probable cause to search does not require the same standard of proof necessary to establish guilt at trial.” Guthmiller at ¶10 (quoting Ringquist at 212). “The task of the issuing magistrate is to make a practical, commonsense decision whether, given all the information considered together, there is a fair probability contraband or evidence of a crime will be found in a particular place.” Guthmiller at ¶10 (quoting State v. Rydberg, 519 N.W.2d 306, 308 (N.D. 1994)).

The Defendant argues there was no probable cause for the search warrant specifically claiming there was not a sufficient nexus between the apartment searched and the contraband sought. See Defendant’s Brief at 8. The State believes there was a sufficient nexus.

As a threshold matter, the Defendant’s “nexus” argument was not raised to the trial court in its motion to suppress. See Appellee’s Appendix at 1-9 (Defendant’s motion to suppress and brief in support of motion to suppress). The Defendant’s argument to the trial court centered around Jack Williams’ reliability and the CI’s reliability. The Defendant did not specifically raise the “nexus” argument. This Court does not address issues raised for the first time on appeal. Bay v. State, 2003 ND 183, ¶14, 672 N.W.2d 270. Because this argument was not raised at the trial court, the issue should not be addressed on appeal.

Notwithstanding the fact the “nexus” issue was not raised to the trial court, the State believes there was a sufficient “nexus” between the residence and the contraband sought by law enforcement. In order to find probable cause for the issuance of a search warrant, the evidence must show a nexus between the residence and the contraband sought. Guthmiller at ¶21. This Court has recognized circumstantial evidence alone may establish a nexus in support of the search warrant. Guthmiller at ¶21. “This nexus between the residence to be searched and the evidence sought need not be established by direct observation [but] may be inferred by connecting circumstances.” Guthmiller.

In this case, narcotics officers conducted two controlled buys at 1444 32nd Street Southwest in Fargo. See Appellant’s Appendix at 9-12 (search warrant). The controlled buys took place on February 20, 2001, and on March 6, 2001. Id. During the February controlled buy, Williams used the telephone at apartment number 210 to call the CI. Id. The CI’s caller identification showed the telephone call came from a number belonging to Steven Alan Olson. Id. Olson resided at apartment number 210. Id. Furthermore, Detective Hudson researched the police computer system and found Scott Alan Olson had been “named with several other individuals in cocaine trafficking in the Fargo/Moorhead area.” Id. This Court has recognized “[a] suspect’s criminal history may be used to support a determination of probable cause when used in connection with other evidence.” State v. Corum,

2003 ND 89, 663 N.W.2d 151. Finally, law enforcement officers actually observed Williams walk to and from the apartment building at 1444 32nd Street Southwest in Fargo during the drug transaction.

The CI made a telephone call from apartment number 210 concerning drug sale. Scott Alan Olson's name had been associated with drug trafficking. The officers actually observed Williams enter the specific apartment building. These facts allowed the issuing magistrate to logically infer the drug transaction took place in apartment number 210. The trial court correctly concluded the search warrant was supported by probable cause because the affidavit contained in the search warrant provided a sufficient nexus between the residence and the contraband sought.

II. The scope of the search warrant extended to the Defendant's purse.

Secondly, the Defendant argues even if the search warrant is valid, the scope of the search warrant did not extend to the Defendant's purse. When a search warrant is being executed, "[t]he authority to search is limited to the place described in the warrant." State v. Erickson, 496 N.W.2d 555, 560 (N.D. 1993). "A search conducted pursuant to a search warrant may extend to the entire area covered by the warrants description." Erickson. "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that [a] separate act of entry or

opening may be required to complete the search.” Erickson (quoting U.S. v. Ross, 102 S.Ct. 2157 (1982)). “The test for determining whether a search has exceeded the scope of the warrant is one of reasonableness.” State v. Soua Thao Vang, 352 N.W.2d (Minn. 1984) (citing Illinois v. Gates, 462 U.S. 213 (1983)).

In this case, the warrant authorized a search for:

1. Controlled substances, specifically cocaine and methamphetamine.
2. Paraphernalia designed for using, packaging, marketing, selling, receiving, growing, manufacturing, concealing, and otherwise dealing in controlled substance use and delivery.
3. Money received from the sale of controlled substances or intended for the purchase of controlled substance.
4. Records concerning the purchase, use and/or sale of controlled substance including customer lists, source lists, pay/owe sheets, bank ledgers, account books, recipes, photographs, directions for using or manufacturing controlled substances or similar materials: Regardless of the storage media utilized, to include electronic organizers, personal computers, portable/lap-top computers, digital storage devises, magnetic media, photographic images, notations on

paper, or other printed material.

5. Numerical data contained on caller I.D. devices, pagers, cellular telephones, or similar devices located at 1444 32nd St. SW #210, Fargo.
6. Indicia of residence or occupants of the residence of 1444 32nd St. SW #210, Fargo.
7. Controlled substances, paraphernalia, items of contraband and/or money used for the purchase or received from the sale of controlled substances found on persons situated in 1444 32nd St. SW #210, Fargo, or who immediately flee from said location at the instant the search is announced.

(Appellant's Appendix at 8). During the search, Detective Lynk found the Defendant's purse lying on the bed in the master bedroom. (Tr. at 86, lines 15-17). Detective Lynk saw large bundles of money in the purse. (Tr. at 87, lines 0-1).

Detective Lynk searched the purse and found a film container with methamphetamine inside (Tr. at 89, lines 15-18).

Detective Lynk also found an advertisement for a scale, a notebook, and several other pieces of paper in the purse. (Tr. at 91-2).

The search warrant specifically authorized a search for narcotics and money. (Appellant's Appendix at 8). Detective Lynk found a large quantity of money in the purse. Williams referred to his drug source as a female. (Appellant's Appendix at 11). A female would typically carry a purse. Officers knew Scott Olson was involved in a verbal dispute with the Defendant at 1444 32nd Street Southwest in January of 2001, so officers knew the Defendant had been at the residence in the past. (Appellant's Appendix at 10). The Defendant was in her pajamas when officers entered the residence which would indicate she was more than a short time visitor. (Tr. at 41, lines 1-2). The Defendant was the one running to the bathroom, attempting to flush methamphetamine down the toilet when the officers entered (Tr. at 35). Officers found the purse in a room full of drugs, drug paraphernalia, and cash. Based on those facts, it was reasonable for Detective Lynk to believe the purse contained narcotics and/or money associated with narcotics transactions. Thus, officers did not exceed the scope of the search warrant when they searched the Defendant's purse.

III. The trial court correctly denied Defendant's motion for new trial.

Finally, the Defendant argues the trial court erred in denying its motion for new trial based on newly discovered evidence. "Under N.D.R.Crim.P. 33(a), the trial court may grant a new trial to the defendant if required in the interest of justice." State v. Greywind, 2004 ND 213, ¶18, 689 N.W.2d 390. "To prevail on

a motion for a new trial on the ground of newly discovered evidence, the defendant must show (1) the evidence was discovered after trial, (2) the failure to learn about the evidence at the time of trial was not the result of the defendant's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in an acquittal." Greywind at ¶18. "A motion for new trial based upon newly discovered evidence rests within the discretion of the trial court, and [this Court] will not reverse the court's denial of the motion unless the court has abused its discretion." Greywind. "If the newly discovered evidence is of such a nature that it is not likely to be believed by the jury or the change the results of the original trial, the court's denial of the new trial motion is not an abuse of discretion." Greywind.

In this case, the Defendant submitted an affidavit of Jack Williams in support of its motion for new trial. (Appellant's Appendix At 105-9). In it, Williams claims the two controlled buys referenced in the search warrant took place behind the apartment building at 1444 32nd Street Southwest in Fargo. Id. (emphasis added). Williams says, "I walked into the building through the front door, down a hallway, and out the back behind the building, where I met [my drug sources]." (Appellant's Appendix at 107). The Defendant argues it is entitled to a new trial because Williams now says someone other than the Defendant was his

“source.” First, this evidence is irrelevant to the trial because the Defendant was convicted of possession of a controlled substance with intent to deliver - not delivery of a controlled substance. Second, this “newly acquired information” is irrelevant to the search warrant because the search warrant is for a place, not a person.

William’s affidavit says the Defendant was not involved in the two cocaine deliveries on February 20, 2001 and March 6, 2001. Id. The Defendant has not been charged with delivery of cocaine. The jury convicted the Defendant of possession of a controlled substance (methamphetamine) with intent to deliver, possession of a controlled substance (methamphetamine), possession of a controlled substance (marijuana), and possession of drug paraphernalia as a result of the search warrant. The charges had nothing to do with the prior deliveries.

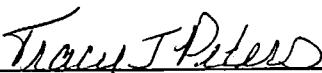
Neither party presented any evidence at trial concerning the prior deliveries. Any information pertaining to the two prior deliveries also does not change the fact that officers executing the search warrant caught the Defendant running down the hallway, attempting to flush a large quantity of methamphetamine down the toilet and officers also found drugs, drug paraphernalia, and two thousand six hundred sixty-five dollars (\$2665.00) in the Defendant’s purse. The information in William’s affidavit is not material to the issue at trial because the issue was possession, not delivery.

Furthermore, Williams' affidavit actually supports the conclusion there was drug trafficking going on at 1444 32nd Street Southwest, Apartment 210. Williams says he and Scott Olson shared methamphetamine at the apartment. (Appellant's Appendix at 107). Williams says "Donny Cotton was also there and he was the source of meth[amphetamine]." (Appellant's Appendix at 107). Williams says "Cotton stayed at Olson's apartment some of the time and kept all of his personal belongings at Olson's [and] used Olson's apartment when he was not present." (Appellant's Appendix at 107). Regardless of who was involved in drug trafficking at the residence, the search warrant was for the place, not any particular person, and Williams' affidavit supports the conclusion there was drug activity taking place at the residence. Therefore, the trial court correctly denied the Defendant's motion for new trial because the information in Williams' affidavit was not relevant to the issues at trial and the information would not likely have resulted in an acquittal.

CONCLUSION

The trial court correctly denied the Defendant's motion to suppress because the information in the search warrant established a nexus between the residence and the contraband sought. Also, the search of the Defendant's purse was within the scope of the search warrant. Finally, the trial court correctly denied the Defendant's motion for new trial based on William's affidavit. Therefore, the State respectfully requests this Court affirm the trial court's order denying the motion to suppress and order denying new trial.

Dated this 9th day of March, 2005.



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AFFIDAVIT OF SERVICE BY MAIL
Supreme Court # 20040292
District Court # 09-03-K-00792

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF CASS)

Tracee Nygaard, being first duly sworn on oath, deposes and states that she is of legal age and that on this date she deposited in the United States Mails at Fargo, North Dakota, a true and correct copy of the following documents and a 3½ inch computer disk in the above-entitled action:

APPELLEE'S BRIEF & APPELLEE'S APPENDIX

The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Mr. Dennis Fisher
Attorney at Law
P.O. Box 1287
Moorhead, MN 56561-1287

Dated this 9th day of March, 2005.

Subscribed and sworn to before me this 9th day of March, 2005.

Tracee Nygaard

Trina A. Hiemer
Notary Public

