ORIGINAL

In the
Supreme Court
for the
State of North Dakota

20040292

Supreme Court No. 20040292
Cass Co. No. 03-K-00792

State of North Dakota,

Plaintiff/Appellee,

vs.

Michelle Renae Driscoll, aka, Michelle Pricilla Driscoll

Defendant/Appellant.

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.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

NORTH DAKOTA CASES:

ARGUMENT

Appellant's Reply Brief will focus only on the probable cause issue.

There is, of course, a long line of cases in North Dakota which were cited in both Appellant's Brief and in Appellee's Brief. The simple synopsis of these cases is cited at page 8 of Appellee's Brief quoting the North Dakota court in *State v. Guthmiller,* 2002 ND 116, 646 N.W.2d 724, "The task of the issuing magistrate is to make a practical, common sense decision whether, given all of the information considered together, there is a fair probability contraband or evidence of a crime will be found in a particular place." *Id.*, 2002 ND 116, ¶ 10.

The State, in its Brief, sets out the information considered by the magistrate in issuing the search warrant in its brief. (Appellee Brief at pages 9-10). The information is:

1. Law officers made two (2) controlled purchases using a confidential informant and a third party, Jack Williams, previously unknown to officers.

2. During the first transaction on February 20, 2001, Williams made a telephone call (not the CI as stated in Appellee's Brief - see Appellant Appendix, page 10) from a telephone number associated with Apartment No. 210 in the apartment building.

3. During each transaction, the officers actually observed Williams enter a specific multiple unit apartment building at 1442 30th Street Southwest in Fargo. The telephone number from which Williams had made his call was listed in the name of a Scott Allen Olson.

4. Officers had raw intelligence that Scott Allen Olson, with several other individuals, was involved in cocaine trafficking in the Fargo-Moorhead area (Appellant Appendix 10).

At no time did the confidential informant enter the apartment building, let alone Apartment No. 210. At no time did the confidential informant meet with the occupants of Apartment No. 210. The officers do not identify Williams as a person with whom they

had had prior dealings or provide any other information as to Williams' reliability.

Consequently, the magistrate had only the three of the four items listed above to review. Item No. 4, the State's characterized criminal history must be totally disregarded under North Dakota decisions. The State cites *State v. Corum,* 2003 ND 89, 663 N.W.2d 151, as authority for the use of a suspect's criminal history to support the determination of probable cause when used in connection with other evidence. *Id.* 2003 ND 89 at ¶ 26. While the principle may be accurate, the State does not correctly interpret the Corum case. Corum's criminal history had several prior drug related charges and a police informant had provided direct evidence of Corum's involvement in the purchase of methanphetamine ingredients, the manufacture of methanphetamine, and the storage of methanphetamine in Corum's apartment. *Id.* at ¶ 27. There was other information of Corum's involvement in the theft of ingredients used to make methanphetamine as additional probable cause information. *Id.*

State v. Ennen, 496 N.W.2d 46 (N. D. 1993), is a better precedent for the use of criminal history. In that case the officer requesting the search warrant stated "Based upon my investigation of the Ray, North Dakota, area, I have determined that Mr. Patrick Ennen is a known drug user". *Ennen,* at 48. The North Dakota Supreme Court characterized the statement as a "bare conclusion" as to Ennen's reputation. *Ennen,* at page 50. The Court then went on to say "mere statements of reputation or unsupported conclusions and allegations are insufficient to establish probable cause. Citing *State v. Handtmann,* 437 N.W.2d 830, 835 (N.D. 1989). Reputation must be demonstrated by specific underlying circumstances to support of finding of probable cause, citing *Handtmann,* and *State v.*

Erickson, 496 N.W.2d. 555, 558 (N.D. 1993). The Court concluded "since Carlson's statement of reputation is devoid of evidentiary support, it cannot support a finding of probable cause". *Ennen,* at page 50.

We are left with an officer's observation of a third party with whom the officer had had no prior experience going into a multi-unit apartment building on two occasions and making a telephone call from a specific apartment in that building on one occasion and absolutely nothing more. The information is certainly not adequate to support the issuance of a search warrant for any place, let alone Apartment No. 210. The Defendant properly moved to suppress all evidence gathered in this illegal search and the Trial Court denied the motion.

Using the principles established in *Guthmiller,* the issuing magistrate's only "practical, common sense decision" was to tell the officer's they had insufficient probable cause to issue a search warrant for any place under these circumstances. What the magistrate should have told the officers was to go out and arrest Williams, who made two observed felony sales of controlled substances to the officers' confidential informant and debrief him to obtain more information on the source of the drugs. The "Nexus" argument need not even be reached. This was simply a bad warrant.

This is in response to the "Nexus" issue raised by Appellee in her brief. At the suppression hearing the State made the same arguments in support of the affidavit of probable cause as appear in Appellee's Brief at pages 9-10 (Suppression Hearing Transcript, September 13, 2003, pages 38, lines 11-25 and page 39, lines 1-6). Defendant countered challenging the connection of the activities with Apartment 210 in Defendant's Suppression

Hearing Argument. (Suppression Hearing Transcript, September 17, 2003, page 40, lines 15-20). The issue had been addressed as a part of the suppression hearing proceedings.

This Court should reverse the trial court's determination and suppress the evidence obtained during the course of the search. The conviction of the defendant should be set aside.

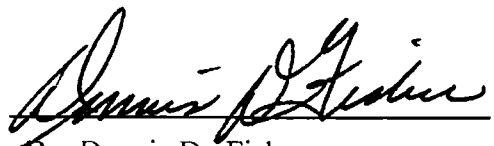
CONCLUSION

Appellant respectfully request this Court to reverse and set aside the conviction obtained in the lower court and order all items seized during the execution of the search warrant be suppressed. It is clear the Affidavit in Support of the Application for the Search Warrant is inadequate.

Respectfully submitted,

Dated this 23 day of March, 2005.

STEFANSON, PLAMBECK, FOSS & FISHER, PLLP



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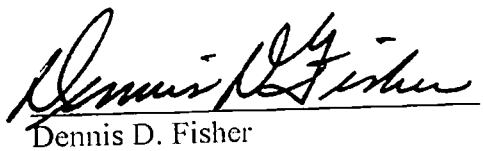
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Reply Brief of Appellant complies with the type-volume limitations imposed therein. The Reply Brief of Appellant contains 984 words of proportionately spaced type as counted by WordPerfect 11.0, the software used to prepare the brief.



Dennis D. Fisher

AFFIDAVIT OF SERVICE BY MAIL

20040292

STATE OF MINNESOTA)
)SS.
COUNTY OF CLAY)

Linda C. Bietz, being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Clay County, Minnesota, and that she served the attached

APPELLANT'S REPLY BRIEF

on the following person(s):

Ms. Tracy Peters
Assistant State's Attorney
PO Box 2806
Fargo ND 58108

by depositing in the United States Post Office on March 23, 2005, a true and correct copy thereof, with postage fully prepaid and addressed to each person above named at the above address.

That the undersigned knows the person served to be the person named in the papers served and the person intended to be served.

Linda C. Bietz

Subscribed and sworn to before me this 23rd of March, 2005.

Notary Public
Clay County, Minnesota

ROBERT J. SCHAEFER
NOTARY PUBLIC - MINNESOTA
My Commission Expires Jan. 31, 2010