ORIGINAL

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

20050180

Corey Lee Dockter,

Defendant/Appellant,

vs.

State of North Dakota,

Plaintiff/Appellee.

Supreme Court No.: 20050180

District Court No.: 09-O4-K-04568

APPEAL FROM CRIMINAL JUDGMENT AND COMMITMENT ENTERED MAY 2, 2005, AND UNDERLYING ORDER DENYING MOTION TO SUPPRESS ENTERED ON APRIL 4, 2005 IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA, THE HONORABLE STEVEN E. MCCULLOUGH PRESIDING

BRIEF OF DEFENDANT/APPELLANT, COREY LEE DOCKTER

Tracy A. Gompf, ND ID# 05350
Attorney at Law
3431 4th Avenue South, Suite 200
P.O. Box 9706
Fargo, ND 58106-9706
Tele: 701-298-9363
Fax: 701-298-9362
Attorney for Defendant /Appellant

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STATEMENT OF THE CASE

This is an appeal from a Criminal Judgment and Commitment entered on May 2, 2005, by the Court, the Honorable Steven E. McCullough, Judge of the District Court, presiding. (App. at 8).

Defendant/Appellant Corey Lee Dockter (hereinafter referred to as "*Appellant Dockter*") was charged by a Criminal Information dated December 1, 2004. with three Counts; Count 1 – Possession of a Controlled Substance, Count 2 - Possession of Marijuana Paraphernalia, and Count 3 - Possession of Less Than One-Half Ounce Marijuana. (App. at 4).

Appellant Dockter filed a Motion to Suppress Evidence and the State resisted the same. A hearing on Appellant Dockter's motion was held on March 23, 2005. At the hearing, both Appellant Dockter and the State presented witnesses and testimony. Following the hearing, the trial judge, the Honorable Steven E. McCullough issued an Order Denying Motion to Suppress which was filed on April 4, 2005. (App. at 6).

Appellant Dockter entered guilty pleas to Counts 1 and 3 on May 2, 2005, pursuant to Rule 11(a)(2) of the North Dakota Rules of Criminal Procedure, reserving his right to appeal the adverse ruling on the Motion to Suppress Evidence. (App. at 14).[1] Count 2 was dismissed. Appellant Dockter was

[1] The original Reservation of Right to Appeal, Consent of Prosecution and Approval by Court was signed by both parties and Judge McCullough. (Docket

sentenced to 18 months, first to serve 30 days jail at the Cass County Jail, the remainder on probation, consistent with attached terms. (App. at 8). The trial court agreed to stay the jail time pending the appeal, however probation commenced immediately following sentencing. Id.

Appellant Dockter filed a timely Notice of Appeal on May 18, 2005. (App. at 16).

#40). Counsel has attached a copy with only the signature by the State, as counsel neglected to obtain a copy of the original before the record was forwarded to the Supreme Court. (App. at 14).

STATEMENT OF FACTS

The incident which gives rise to the facts in this case occurred in an apartment building on November 30, 2004. Hrg. Tr., p. 27, lines 10-21. Law enforcement received a call regarding "30 people climbing into a second floor apartment building." Hrg. Tr., p. 27, lines 16-18. The apartment in question was across the hall from Appellant Dockter's apartment, number 209. Hrg. Tr., p. 27, lines 18-20.

Inside the apartment which supported the call to law enforcement (not Appellant Dockter's) Officer Bob Stanger came upon a white male approximately 19 years old who was suspected of being under the influence of methamphetamine. Hrg. Tr., p. 27, lines 24-25, p. 28, lines 1-3. This individual did not have a reason to be present at the apartment and was handcuffed. Hrg. Tr., p. 28, lines 4-6. Officer Stanger heard this individual "ranting and raving about a woman and a child being in danger in the apartment across the hall, 209." Hrg. Tr., p. 28, lines 7-8.

The ranting story by the allegedly meth-induced young man led officers to apartment 209 (Appellant Dockter's). Officer Stanger indicated that "I wanted to make sure with the people in that apartment and make sure everything was okay, see if he knew them, see if there were in fact, a woman and child in there, what their status was." Hrg. Tr., p. 28, lines 11-15.

Officer Stanger approached Appellant Dockter's door, knocked and identified himself. Hrg. Tr., p. 29, lines 4-5. He heard movement "like mice

scurrying" but no dangerous noises such as yelling or screaming. Hrg. Tr., p. 39, lines 23-25, p. 40, lines 1-4. Eventually, Appellant Dockter answered the door. Hrg. Tr., p. 29, lines 8-9.

Officer Stanger testified that he asked the individual who opened the door (Appellant Dockter) if everything was alright. Hrg. Tr., p. 30, lines 18-21. Officer Stanger testified that Appellant Dockter indicated "Yes, everything's fine." Id.; p. 38, lines 1-4. Officer Johnson did not recall hearing the "verbal exchange". Hrg. Tr., p. 44, lines 3-11.

One witness, Nicole Rhodes, testified that the officers entered Appellant Dockter's apartment with their guns drawn. Hrg. Tr., p. 6, lines 9-10. Another witness, Avery Dockter, testified that one of the officers had a gun drawn when Avery entered the room. Hrg. Tr., p. 23, lines 9-10. Officer Stanger acknowledged that he had his Taser out before entering the apartment. Hrg. Tr., p. 29, lines 13-14. Officer Stanger acknowledged that the Taser looks like a handgun. Hrg. Tr., p. 37, lines 13-14. Officer Joe Johnson testified that Officer Stanger had his Taser drawn at the initial encounter. Hrg. Tr., p. 44, lines 13-14.

One of the major issues in this case involves whether or not consent to enter the apartment was granted. Nicole Rhodes testified that she was in a position to hear the exchange and did not hear Appellant Dockter consent to the entry by law enforcement. Hrg. Tr., p. 7, lines 10-17; p. 13, lines 21-25; p.14, lines 9-17; p. 18, lines 17-24; and p. 19, lines 1-2. Officer Stanger testified that he asked for consent. Hrg. Tr., p. 30, lines 23-25; and p. 38, lines 8-11. Initially, Officer

Johnson indicated upon direct examination that he heard Appellant Dockter consent to law enforcement entry into the apartment. Hrg. Tr., p. 43, lines 1-4. However, upon cross-examination, Officer Johnson admitted that he didn't remember the "verbal exchange". Hrg. Tr., p. 44, lines 3-9. Officer Johnson also admitted that he was holding another handcuffed suspect (not from Appellant Dockter's apartment) against the wall with his back at the time of the encounter between Officer Stanger and Appellant Dockter. Hrg. Tr., p. 44, lines 15-22.

Upon entering Appellant Dockter's apartment, Apellant Dockter was handcuffed. Hrg. Tr., p. 6, lines 9-13. Another occupant, Avery Dockter was also handcuffed. Hrg. Tr., p. 6, lines 13-16. The officers searched several items including a wastebasket, a hat inside of a glass table and Appellant Dockter's wallet. Hrg. Tr., p. 11, lines 1-4. Officer Stanger testified that he observed a pipe cleaner with a tarry substance on the top of the trash in a garbage can. Hrg. Tr., p. 32, lines 23-25. Whether or not this item was in plain view was disputed. Officer Stanger located a pipe and marijuana in a film canister inside of a hat which was stuffed inside a glass table. Hrg. Tr., p. 33, lines 10-21, p. 34, lines 8-19. Whether or not this item was in plain view was disputed. Finally, Officer Stanger located a baggie in Appellant Dockter's wallet (which was later found to contain methamphetamine). Hrg. Tr., p. 35, lines 8-17. Officer Stanger indicated that he would search Appellant Dockter "for his own safety" and ended up with an I.D. card, as the officer returned the card to the wallet, he located the baggie. Id. Officer Stanger later indicated that the baggie was found "by consent" and as a

"search incident to arrest". Hrg. Tr., p. 35, lines 18-19. Interestingly enough, a search warrant was sought after all of the above-listed items were seized based upon the warrantless search of Appellant Dockter's apartment and personal effects.

The items seized as a result of the search, including the pipe cleaner, several pipes, marijuana from film canister, and baggie were all challenged as "fruit of the poisonous tree" in Appellant Dockter's Motion to Suppress.

LAW AND ARGUMENT

A. Standard of Review

The North Dakota Supreme Court in State v. Sabinash, 1998 ND 32, ¶8, 574 N.W.2d 827, outlined the standard of review of a trial court's denial of a suppression motion as follows:

> The trial court's disposition of a motion to suppress will not be reversed if, after conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence. That standard of review recognizes the importance of the trial court's opportunity to observe the witnesses and assess their credibility, and we "accord great deference to its decision in suppression matters."

State v. Norrid, 2000 ND 112, ¶5, 611 N.W.2d 866, *citing* State v. Sabinash.

However, in State v. Matthews, 2003 ND 108,¶16, 665 N.W.2d 28, the North Dakota Supreme Court recognized that the standard of review is different when reviewing the trial court's determination of the existence of exigent circumstances (and emergency doctrine):

> A de novo standard of review is applied to the ultimate determination of whether facts constitute exigent circumstances...This is similar to our review of probable cause. ([W]e defer to a trial court's findings of fact in the disposition of a motion to suppress, but whether findings of fact meet a legal standard is a question of law which is fully reviewable).

(citations omitted) Matthews at ¶16, *citing* State v. Decoteau, 1999 ND 77, ¶15, 592 N.W.2d 579. This different standard should be applied when addressing Issue II below.

I. The Warrantless Search Of Appellant Dockter's Apartment And Subsequent Seizure Of Various Items Was Improper.

a. Constitutional Framework

The Fourth Amendment of the Constitution of the United States provides *"that the right of the people to be secure in their persons, papers, and effects against unreasonable searches and seizures should not be violated, no warrants shall issue, but upon probable cause, supported by or affirmation in particularly*

describing the place to be searched and the person or things to be seized." Similarly, Article I, Section 8 of the Constitution of North Dakota provides similar protection with almost identical language.

Individuals are protected from unreasonable searches and seizures in their home by the Fourth Amendment to the United States Constitution and by Article I, Section 8 of the North Dakota Constitution. The United States Supreme Court has recognized a "*physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.*" "*The Fourth Amendment has drawn a firm line at the entrance to the house.*" "*Absent exigent circumstances, that threshold may not be reasonably crossed without a warrant.*" As the Supreme Court recently reiterated, "*police officers need either a warrant or probable cause, plus exigent circumstances, in order to make a lawful entry to the home.*" "*Warrantless searches and seizures inside a home are presumptively unreasonable.*" State v. Keilen, 2002 ND 133, ¶11, 649 N.W.2d 224. (citations omitted). It is undisputed in this case that law enforcement lacked a search warrant to enter the premises at Apartment 209 (Appellant Dockter's residence).

Appellant Dockter acknowledges that a defendant has the initial burden of establishing that evidence is illegally seized. City of Jamestown v. Jerome, 202 ND 34, ¶6, 639 N.W.2d 478. If this burden is met, the burden shifts to the prosecution to demonstrate that a warrantless search fits within an exception to the warrant requirement. City of Fargo v. Lee, 1998 ND 126, ¶8, 580 N.W.2d 580. If the Government is unable to demonstrate that evidence seized without a warrant

fits within one of the recognized exceptions, any evidence seized is fruit of the poisonous tree and must be suppressed. Keilen at ¶12.

In the present case, there was no warrant authorizing entry of law enforcement into Appellant Dockter's apartment. (Although a warrant was obtained subsequent to the search and seizure of the items challenged in this case.) As warrantless searches are inherently unreasonable, the burden shifts to the government to demonstrate an exception to the warrant requirement.

II. No Exception To The Warrant Requirement Based Upon Exigent Circumstances, Emergency or Community Caretaker Existed.

The State may argue that law enforcement entered the residence in this case due to so-called exigent circumstances or in community caretaker function. Facts related to this issue were presented at the hearing. However, the trial court relied upon the existence of consent by Appellant Dockter for the officer's entry into his apartment in reaching its decision. Hrg. Tr., p. 50, lines 1-2, *see also* Order Denying Motion to Suppress (App. at 6). Although Appellant Dockter briefed the issue of exigent circumstances, no findings were made by the trial court with respect to this issue. As counsel believes that this issue will come before the Court, Appellant Dockter's position is presented herein.

Officer Stanger arrived at the apartment across the hall from Appellant Dockter based upon a report that thirty people were climbing into a second floor window. Hrg. Tr., p. 27, lines 16-18. After his arrival, Officer Stanger had an encounter with a male who appeared to be on methamphetamine. Hrg. Tr., p. 28,

lines 1-2. This individual communicated with Officer Stanger "ranting and raving about a woman and a child being in danger in the apartment across the hall, 209." Hrg. Tr., p. 28, lines 7-8. The officer knocked on the door, identified himself as Fargo Police and although he could hear movements inside the apartment, no one immediately came to the door. Hrg. Tr., p. 29, lines 4-9.

Appellant Dockter came to the door. Officer Stanger asked if everything was okay and the response was something to the effect of "everything is fine". Hrg. Tr., p. 30, lines 20-22. Officer Stanger acknowledged that he did not hear any dangerous noises, yelling, screaming etc. Hrg. Tr., p. 39, lines 23-25.

Although it is disputed whether or not there was consent for law enforcement to enter the apartment, the nature of the behavior of law enforcement was clearly investigative and not community care-taking. Inside the residence, Defendant Dockter and Avery Dockter were immediately handcuffed. Officer Stanger indicated that the handcuffs were for the officer's safety. Hrg. Tr., p. 38, lines 22-25.

In State v. Decoteau, 1999 ND 77, 592 N.W.2d 579, the North Dakota Supreme Court analyzed the issue of a warrantless entry into a home based upon exigent circumstances and/or community care-taking function. Exigent circumstances has been defined as "*an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of suspect, or destruction of evidence.*" Decoteau at 584, *citing* City of Fargo v. Lee, 1998 N.D. 126 ¶10, 580 N.W.2d 580. The burden is

upon the Government to demonstrate exigent circumstances and to overcome the presumption a warrantless search is unreasonable. In Decoteau, the court determined that the circumstances did not justify exigent circumstances. Decoteau involved an anonymous report of a domestic disturbance. Decoteau at 584. When the officers arrived, there was no disturbance. Id. The court applied the same analysis for both the exigent circumstances and community care-taking role, indicating that no such role was necessary, because there was no disturbance.

In Keilen, *Supra*, the facts were very similar to the present case. Fargo police officers were dispatched to an apartment building to investigate the report of a domestic dispute. Keilen at 226. A neighbor reported yelling, fighting, and a loud crash. When the officer first arrived, he spoke with the neighbor, the neighbor told the officer he was afraid someone was hurt. A second officer arrived shortly after the first officer. Id. After discussion with the neighbor, the officer went to listen to the door for 20 seconds and identified himself. He continued to knock for a minute or two without a response, although he heard voices murmuring. The officer continued to knock on the door and identify himself further. After no response, the officer and his partner entered the apartment. Once inside, the officers encountered the residents. One of the residents had scratches on his face; however, the individual indicated they were not in need of assistance. Even though both individuals refused help, the officers interviewed them about loud noises reportedly coming from their apartment and the officers identified marijuana and marijuana paraphernalia in plain view within

the apartment. Ultimately, the items observed in plain view lead to a search warrant. The Keilen court reasoned upon these facts that there was no community care-taking role to fulfill, as there was no disturbance. Id. at 231. Because there was no disturbance when the officers arrived and it was not discernable to the officers that anyone required assistance, the community care-taking function did not apply. Id. at 231.

The same analysis would apply if the Court considers the situation to be an "emergency". See, State v. Matthews, 2003 ND 108, ¶15, 665 N.W.2d 28. (Same analysis applies to exigent circumstances and the emergency doctrine). It should be noted the burden is on the State to show that the warrantless entry fits within an exception to the warrant requirement. Matthews at ¶15.

In the present case, the only cause for concern were "*rambling*" and vague comments about a woman and a baby from an individual who was acting erratically, likely based upon use of methamphetamine. This individual was the subject of wrongful entry into a different apartment. This individual was placed in handcuffs. The officers continued investigating the wrongful entry issue before taking it upon themselves to follow up on the concerns related to apartment 209. Similar to Keilen and Decoteau, the officers knocked and identified themselves, but did not hear any suspicious activity. Moreover, upon entry into the apartment, it was apparent that there was no woman or baby in distress. Because there was a lack of an observable disturbance or problem, there were no exigent circumstances

nor was there a need for a community care-taking function. Therefore, this exception of the warrant requirement fails.

III. Appellant Dockter Did Not Or Could Not Consent To The Officer's Entry Into His Apartment.

In the present case, there is a dispute as to whether or not Defendant Dockter consented to the entry of law enforcement into the apartment. The trial court made a specific finding "that the testimony provided by Nicole Rhodes regarding the issue of whether consent was granted was not conclusive." (App. at 6). The trial court also indicated following the hearing:

> The testimony of Nicole Rhodes initially was that it was all confusion, and she was not sure if the defendant gave permission to enter or consent to enter. On cross-examination she seemed to indicate that consent was given. However, on her ultimate - - her ultimate testimony apparently was that the initial confusion could have hindered her ability to hear what happened. She wasn't sure.

Hrg. Tr., p. 49, lines 16-22.

It is important to look at exactly what Nicole Rhodes stated to determine whether this finding is against the manifest weight of the evidence. The initial questioning of Nicole Rhodes was as follows:

Q Did you hear Corey indicate that he agreed that law enforcement could enter the apartment?

A THE WITNESS: I'm not sure. I know they didn't have permission. Of course, Corey answered the door. They said, Fargo Police, and then they just walked in. So, no.

Hrg. Tr., p. 7, lines 7-17. (Emphasis added).

In response to questioning from Assistant State's Attorney Lisa McEvers, Nicole Rhodes testified as follows:

Q Ms. Rhodes, did the police officers ask for consent to enter the apartment?

A No.

Q Are you sure?

A Yes.

Q Did you - - in the confusion that you just described, did you hear every part of every conversation that was going on between law enforcement and anyone else at the apartment?

A I heard most of it, yes, because there was at lot of - - it was in raised voices.

Q Did you hear all of it?

A I couldn't say for 100 percent fact.

Q And can you then say for a fact that police officers did not ask for consent 100 percent?

A Yes, because I was standing right by the doorway. I didn't hear all that went on the whole time, but I was standing right from me to him (indicating), by the - - from me to him to the door.

Q So it's your testimony that no consent was granted by anyone?

A Yes.

Hrg. Tr., p. 13, lines 20-25, p. 14, lines 1-17. As the record reflects, Nicole Rhodes was certain consent was not granted, although she may not have heard every conversation with every person and every officer. This directly contradicts the findings of the trial court. Nicole Rhodes further testified:

Q Did the confusion when the first two officers enter hinder your ability to hear what was being said in the doorway?

A It could have.

Hrg. Tr., p. 18, lines 3-6. It should be noted that the confusion occurred when the officers entered, which supposedly occurred after consent was granted. In an effort to clarify the testimony of Nicole Rhodes, Ms. McEvers initiated the following exchange on re-cross examination:

Q I just want to know which is it? Are you 100 percent sure you didn't hear consent or just what you answered to Mr. Gompf? Which is it? Did you hear it or not? (Presumably referring to consent.)

A No.

Q Did you hear everything that was going on or not?

A I heard everything pretty much that was going on at the time of the doorway.

Q Did you - -

A I heard everything that was going on at the doorway.

Hrg. Tr., p. 18, lines 16-25, p. 19, lines 1-2. A careful reading of the transcript demonstrates that the trial court's findings regarding Nicole Rhodes were incorrect. Nicole Rhodes repeatedly stated that she did not hear consent to enter and she did hear what was going on at the doorway. She admitted that she didn't hear all conversations, however there were obviously conversations not occurring at the doorway.

Officer Stanger stated that he heard consent after being questioned by the trial court. Hrg. Tr., p. 30, lines 23-25. Officer Johnson claims that he heard consent. Hrg. Tr., p. 43, lines 3-4. However, on cross-examination, Officer Johnson admitted that he was holding back the original suspect from the other apartment against the wall with his back and "I don't remember what the verbal exchange was." Hrg. Tr., p. 43, lines19-24, Hrg. Tr., p. 44, lines 3-4.

Once again, a careful reading of the transcript reflects that the trial court's findings regarding consent were erroneous and against the manifest weight of the evidence.

The court determines the issue of voluntariness by examining the totality of the circumstances which surround the giving of a confession or consent to search to see whether it is the product of an essentially free choice or the product of

coercion. State v. Discoe, 334 N.W.2d 466, 467 (N.D.1983). "*Under a totality of circumstances standard, although the existence or absence of certain factors concerning: (1) the characteristics and condition of the accused at the time [he or she] confessed or consent; and (2) the details of the setting in which the consent or confession was obtain, are significant in deciding voluntariness, no one factor in and of itself is determinative.*" Id. at 467, 468. In City of Fargo v. Ellison, 2001 ND 175, 635 N.W.2d 151, 156, the North Dakota Supreme Court analyzed a case where a tenant allegedly consented to law enforcement entering only after she was threatened with both arrest and handcuffing if she chose to exercise her right to refuse the police entry. Id. at 156. Moreover, the individual tried to end the conversation and retreat into the apartment. The individual was not free to close the door, walk away, or deny the request for consent. Id. In the present case, the consent issue is disputed. However, even if Defendant Dockter consented, it was certainly not voluntarily and of his own free will, as he was facing law enforcement with at least one drawn weapon.

The North Dakota Supreme Court in State v. Mitzel, 2004 ND 157, 685 N.W.2d 120 (2004), considered whether even allowing law enforcement to follow an individual back into their residence could be considered "*consent.*" Mere acquiescence to police authority is insufficient to show consent. Thus, if Defendant Dockter said nothing and simply stepped back into his apartment with law enforcement following him, that could not be deemed "*consent.*"

Based upon the facts and circumstances in this case, consent cannot be shown as an exception to the warrant requirement, either directly or because such consent was not voluntary. The State failed to meet its burden in demonstrating that an exception to the warrant requirement; therefore, the trial court's finding that consent existed was erroneous. Absent an exception to the warrant requirement, the search and subsequent seizure by the officers of contraband (whether in plain view or not) is invalid and the admission of those items should be suppressed.

CONCLUSION

Based upon the foregoing and above, Appellant Corey Lee Dockter respectfully requests that the Court reverse the Judgment and Conviction entered on May 2, 2005 (essentially reversing the Order Denying Motion to Suppress entered on April 4, 2005) and remand for further proceedings.

Respectfully submitted this 16th day of September, 2005.

Tracy A. Gompf, ND ID#05350
3431 4th Ave. S., Ste. 200
Post Office Box 9706
Fargo, North Dakota 58106-9706
Tele: (701) 298-9363
Fax: (701) 298-9362
ATTORNEY FOR DEFENDANT/
APPELLANT