

ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
Plaintiff-Appellee,)	Supreme Court No. 20050229
)	
vs.)	District Court No. 05-K-0418
)	
Jesse Mikal Anderson,)	
Defendant-Appellant.)	
)	
AND)	
)	
State of North Dakota,)	
Plaintiff-Appellee,)	Supreme Court No. 20050202
)	
vs.)	District Court No. 05-K-422
)	
Daniel James Anderson,)	
Defendant and Appellant.)	
_____)	

20050202 1/1
20050229

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOV 12 2005

STATE OF NORTH DAKOTA

APPEALS FROM CONDITIONAL GUILTY PLEAS
ENTERED ON JUNE 2, 2005 AND MAY 17, 2005
IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA
THE HONORABLE FRANK L. RACEK

APPELLEE'S BRIEF

Aaron G. Birst, NDID #05820
Assistant State's Attorney
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorney for Plaintiff-Appellee

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ¶1

STATEMENT OF ISSUES ¶2

STATEMENT OF THE CASE ¶3

STATEMENT OF FACTS ¶5

ARGUMENT ¶12

I. The Fargo police officers had a reasonable and articulable suspicion to stop the defendants' vehicle.. ¶13

 A) The Fargo police officers were justified in relying on Deputy Gress' information to establish reasonable suspicion for the initial stop of the defendant's vehicle ¶15

 B) The information relayed to the Fargo police was not from an anonymous source but from a known individual and from multiple sources thereby making such information reliable enough to create reasonable and articulable suspicion to initiate further investigation ¶18

 C) The police officers had reasonable and articulable suspicion to consider the defendants to be armed and dangerous justifying their detention pending further investigation and justifying the search of the vehicle ¶24

II. The Fargo police officers had probable cause to arrest the defendants for possession of concealed weapons. ¶29

CONCLUSION ¶32

CERTIFICATE OF SERVICE ¶34

[¶ 1] TABLE OF AUTHORITIES

CASES

City of Fargo v. Ovind, 1998 ND 69, 575 N.W.2d 901 ¶ 23

Jamestown v. Jerome, 2002 ND 34, 639 N.W.2d 478 ¶ 31

Minnesota v. Dickerson, 508 U.S. 366 (1993) ¶ 16

New York v. Class, 475 U.S. 106 (1986) ¶ 25

New York v. Quarles, 467 U.S. 649 (1984) ¶ 26

Pennsylvania v. Mimms, 434 U.S. 106 (1986) ¶ 26, 31

State v. Boline, 1998 ND 67, 575 N.W.2d 906 ¶ 16

State v. Connery, 441 N.W.2d 651 (N.D. 1989) ¶ 26

State v. Dymowski, 458 N.W.2d 490 (N.D. 1990) ¶ 19, 22

State v. Greg, 2000 ND 154, 615 N.W.2d 515 ¶ 14

State v. Haverluk, 2000 ND 178, 617 N.W.2d 652 ¶ 25, 26, 27, 30, 31

State v. Heitzmann, 2001 ND 136, 632 N.W.2d 1 ¶ 16, 28

State v. Langseth, 492 N.W.2d 298 (N.D. 1992) ¶ 30

State v. Linghor, 2004 ND 224, 690 N.W.2d 201 ¶ 31

State v. Roth, 2004 ND 23, 674 N.W.2d 495 ¶ 19, 22

State v. Smith, 2005 ND 21, 691 N.W.2d 203 ¶ 17

Terry v. Ohio, 392 U.S. 1 (1968) ¶ 16

RULES

N.D.CENT.CODE § 62.1-04-02 ¶ 4

N.D.R.CRIM.P. Rule 11(a)(2) ¶ 4

[¶ 2] STATEMENT OF ISSUES

- I. The Fargo police officers had a reasonable and articulable suspicion to stop the Defendant's vehicle.
- II. The Fargo police officers had probable cause to arrest the defendants for possession of concealed weapons.

[¶ 3] STATEMENT OF THE CASE

[¶ 4] Jesse Anderson and Daniel Anderson were both charged with carrying a concealed firearm or dangerous weapon in violation of N.D.CENT.CODE § 62.1-04-02 on February 7, 2005. (Appellant's Appendix p. 6 & 7). The defendants entered conditional guilty pleas under N.D.R.CRIM.P.Rule 11(a)(2) on May 2, 2005 and May 18, 2005 respectively. (Appellant's Appendix p.14-17). The guilty pleas were entered after the District Court denied the defendants' motions to suppress after a contested hearing on May 3, 2005. (Appellant's Appendix p. 13) (the order denying the defendants' motions to suppress was not signed until June 30, 2005). The defendants filed notices to appeal to the State Supreme Court on the 1st of July and 14th of June 2005 respectively. (Appellant's Appendix p. 24 & 25).

[¶5] STATEMENT OF THE FACTS

[¶ 6] On February 7, 2005, Barnes' County Deputy Joseph Gress received a call from Gregory Anderson (Gregory) who was at the State Hospital in Jamestown for an evaluation. (Tr., p. 47, l. 7 - p. 48, l. 13).¹ Gregory informed Deputy Gress that he had just received a call from his brother Jesse Anderson (Jesse) and that Jesse indicated he was on his way to the Higdem's residence in Fargo to settle a score over a dope deal gone bad. (Tr.. p. 47, l. 12- 14 & p. 50, l. 15- p. 51, l. 1). Gregory also informed Deputy Gress his son Daniel Anderson (Daniel) was also in the vehicle and he was concerned for their safety. (Tr. p. 47, l. 14). Gregory indicated that Jesse was heavily armed and wearing a bullet proof vest and driving either a green four door Ford Pickup or an Intrepid. (Tr. p. 47, l. 15 & p. 49, l. 7-8).

[¶7] Deputy Gress personally knew Jesse and Daniel through his investigations as a narcotics officer. (Tr. p. 46, l. 17 - p. 47, l. 1). In fact, Deputy Gress had previously arrested Daniel and heard a lot about Jesse in connection with drug activity. (Tr. p.46, l. 17 - p. 47, l. 1). Deputy Gress also knew Jesse to have been associated with the green four door Ford pickup and an Intrepid since he had seen those vehicles at various Anderson family residences. (Tr. p. 49. l. 9-15). Deputy Gress had also previously received information regarding Jesse from his ex-wife Mindy Anderson. (Tr. p.52, l.18-22). Mindy Anderson previously informed Deputy Gress that Jesse was known to carry a handgun in the console of his truck and occasionally carry a AK-47 rifle on his person in

1

The State will refer to the transcript in this matter as Tr. followed by page number(s) and line number(s). Additionally, the transcript the State is referring to is from the May 3, 2005. motion to suppress evidence hearing. The transcript of the initial appearance "arraignment" on February 7, 2005, were also included in the appeal but is not referenced.

case the law tries to “fuck” with him. (Tr. p. 48, l. 1-5). From all the information Deputy Gress had compiled on Jesse he considered Jesse a threat. (Tr. p. 48, l.6-9).

[¶ 8] Deputy Gress passed on his information as he was receiving it to the Fargo Police Dispatch. (Tr. p. 49, l. 24 - p. 50, l. 7). Fargo Police Officers’ Nicholas Kjonaas and Jared Crane were dispatched to the Higdem residence in Fargo to try to intercept Jesse. (Tr. p. 4, l. 13 - p. 5, l. 17). Officer Crane started for the residence but then proceeded to a McDonald’s where it was relayed that Jesse and Daniel were possibly located. (Tr. p. 5, l. 7-17). Officer Crane noticed in the drive through at McDonald’s a four-door green Ford pickup registered to Hjalmer or Laraine Anderson from Catherine, North Dakota. (Tr. p.5, l. 18 - p. 7, l. 2). Deputy Gress had also relayed that Jesse was from the Catherine area. (Tr. p. 49, l. 11-14). After more officers arrived, Officer Crane decided to make a stop of the suspect vehicle. (Tr. p. 7, l. 22 - p. 8, l. 5).

[¶ 9] Two Fargo police vehicles boxed in the suspect vehicle and a number of other police vehicles were also present. (Tr. p. 9, l. 3 - p. 10, l. 2). The officers had their emergency lights activated and had drawn their weapons. (Tr. p. 11, l. 4 - p. 12, l. 15). Officer Crane ordered the driver to shut the vehicle off and throw the keys out the window. (Tr. p. 13, l. 1-5). Officer Crane then ordered the driver out of the vehicle and ordered him to put his hands in the air which Jesse did not initially do. (Tr. p. 14, l. 18-20). Jesse also at one point put his hands down and turned to face the officers. (Tr. p. 15, l. 6-8). Ultimately, Jesse was ordered to walk backward to the officers where they could secure him. (Tr. p. 15, l. 11-24). As one of the other officers was moving in to secure Jesse he felt Jesse to be wearing a military style ballistic vest similar to the type worn by the Fargo SWAT team. (Tr. p. 19, l. 1-11). This was again consistent with the

information which had been relayed to the Fargo Officers. (Tr. p. 19, l. 12-16).

[¶ 10] The officers then placed Jesse on the ground but Jesse continued to lift his chest and head up off the ground in violation of the orders the officers had for him. (Tr. p. 15, l. 20 - p. 16, l. 4). As one of the officers was handcuffing Jesse, Officer Crane asked Jesse if he had a gun and Jesse indicated there was a gun in the vehicle. (Tr. p. 37, l. 3-7). The officers then secured Jesse and brought him back to the officer's vehicle. (Tr. p. 39, l. 1-3). Daniel was secured without incident and he complied with the officer's directives. (Tr. p.19, l. 17-24).

[¶ 11] After Jesse and Daniel were secured the officers approached the four door pickup. (Tr. p. 20, l. 1-11). Given the darkness, the tinting of the trucks windows and the high risk nature of the stop the officers approached the vehicle to determine whether anyone else was present. (Tr. p. 20, l. 12- 20). Officer Crane approached the vehicle continuing to yell commands. (Tr. p. 20, l. 2-5). He opened the rear passenger door and immediately noticed on the seat an "AK-47" weapon. (Tr. p. 21, l. 1-20). The uncased "AK-47" violated Fargo's city ordinance. (Tr. p.23, l. 20-22 & p.42, l. 20-22). The officers then opened the front passenger door and found no more individuals in the vehicle. (Tr. p. 22, l. 2-8). The officers then proceeded to search the vehicle which in the truck they found several boxes and loose ammunition for the AK-47 rifle and the 9 millimeter handgun, a machete behind the drivers seat, a 9 millimeter handgun in the glove compartment, and a switch blade in the drivers door pocket. (Tr. p.23, l. 6- p. 26, l. 9). The switch blade that was found was also illegal to possess and it was seen simply by opening the driver's door. (Tr. p.25, l. 1. 1-15).

[¶ 12] **ARGUMENT**

[¶ 13] **I. The Fargo police officers had a reasonable and articulable suspicion to stop the defendant's vehicle.**

[¶ 14] The defendants assert the trial court was in error in not suppressing the evidence against them. The North Dakota Supreme Court has stated, “when reviewing a district court's ruling on a motion to suppress, we defer to the district court's findings of fact and resolve conflicts and testimony in favor of affirmance.”. See State v. Gregg, 2000 ND 154, ¶ 19, 615 N.W.2d 515, 520. Additionally, the Supreme Court will “affirm the district court's decision” unless the Court concludes there is insufficient competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence. Id. at ¶ 19. However, “although the underlying factual disputes are findings of fact, whether the findings meet a legal standard.... is a question of law.” Id. at ¶ 20. (holding whether a reasonable and articulable suspicion standard had been met is fully reviewable on appeal).

[¶ 15] **A. The Fargo police officers were justified in relying on Deputy Gress' information to establish reasonable suspicion for the initial stop of the defendant's vehicle.**

[¶ 16] The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. See State v. Heitzmann 2001 ND 136, ¶ 9, 632 N.W.2d 1, 6. Searches and seizures conducted without a warrant are unconstitutional unless they fall within one of the recognized exceptions to the warrant requirement. See Minnesota v. Dickerson, 508 U.S. 366, 372 (1993). One such exception is where a police officer can reasonably conclude in light of his experience that “criminal activity may be afoot.” Id. (citing Terry v. Ohio, 392 U.S. 1 (1968)) (holding an officer may briefly stop

a suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions). Additionally, reports of possible violent crime requires prompt law enforcement investigation. See State v. Boline, 1998 ND 67, ¶ 31, 575 N.W.2d 906, 910. (holding "the danger of delaying an investigation until the police have probable cause to arrest can have perilous consequences.").

[¶ 17] In this particular case, the Fargo Police officers that stopped the defendants were relying on information being provided to them from another law enforcement agent. (Tr. p. 4, l. 13-15). The North Dakota Supreme Court has stated that "the investigating officer, however, does not need personal knowledge that a law has been or is being violated. A directing officer's knowledge may be imputed to an acting officer." State v. Smith, 2005 ND 21, ¶13, 691 N.W.2d 203, 208. (holding this principle also applies in the reasonable suspicion context). Further, the officer is not required for purposes of reasonable suspicion to isolate "a single factor which signal a potential violation of the law." Id. at ¶ 15. An officer only needs to make a determination based on their training and experiences which creates a reasonable suspicion of potential criminal activity. See Id. (recognizing inferences and deductions officers may make may elude a layperson but must still be considered when assessing reasonableness). Under Smith, the Fargo Police officers were certainly justified to rely on the information Deputy Gress was providing to establish reasonable suspicion for the initial stop of the defendants.

[¶ 18] B. The information relayed to the Fargo police was not from an anonymous source but from a known individual and from multiple sources thereby making such information reliable enough to create reasonable and articulable suspicion to initiate further investigation.

[¶ 19] The defendants argue the officers lacked reasonable suspicion or probable

cause because some of the information being presented to the officers was from Gregory Anderson whose “word should not be trusted.” (Appellant’s Brief p. 24) (stating Greg Anderson is a problematic informant). The North Dakota Supreme Court has identified three types of informants which include citizen, confidential and anonymous. See State v. Roth, 2004 ND 23, ¶ 9, 674 N.W.2d 495, 500. (citing State v. Dymowski, 458 N.W.2d 490 (1990) which upheld a finding of probable cause because the officer vouched for the informant’s reliability). In this case, all of the information provided to the Fargo Police officers and Deputy Gress was from known sources thereby creating a higher degree of reliability.

[¶ 20] The first source for the Fargo police officers information is Deputy Gress himself. (Tr. p. 49, l. 24 - p. 50, l. 7). Deputy Gress had personal knowledge of the defendants and was collecting information on them through his work as a narcotics officer. (Tr. p.46. l. 17 - p. 47, l. 1). Deputy Gress knew Gregory was connected with drug activity and that the Higdems (in Fargo) and Jesse may also be involved. (Tr. p. 50, l. 15-21). It was Deputy Gress’ personal belief based on all his intelligence gathering that Jesse was “absolutely” a threat. (Tr. p. 48, l. 8-9). This personal belief was especially well founded in light of Jesse’s ex-wife’s statement to Deputy Gress that Jesse carried weapons in case the law tries to “fuck” with him. (Tr. p. 48, l. 1-5).

[¶ 21] The second source of information was from Gregory. (Tr., p. 47, l. 7 - p. 48, l. 13). Gregory provided Deputy Gress some of his information both in a general sense, from previous encounters, and specifically with regard to the day of the stop. (Tr.. p. 47, l. 12- 14 & p. 50, l. 15- p. 51, l. 1). No question Gregory was involved in criminal activity himself and had been spending time at the State Hospital in Jamestown for

treatment. (Tr. p. 48, l. 12 - p.50 , l. 21). However, there is also no question Gregory called Deputy Gress because he was concerned for the safety of his son and brother. (Tr. p.47, 12-17) (stating [Gregory] “called me to see if I could do something about that”). Deputy Gress also testified with the exception of just one time Gregory was very truthful and punctual. (Tr. p. 51, l. 16-20).

[¶ 22] As in Dymowski, Deputy Gress was able to vouch for Gregory’s reliability through his previous contacts. 458 N.W.2d at 496. Additionally, the Fargo police officers were able to verify the exact details of where the defendants were located and what they were driving. Roth, 2004 ND 23, ¶ 14 (stating the level of specificity makes it more likely the information provided was accurate). In light of the fact that Gregory was 90 miles away in the State Hospital but able to pinpoint the defendants exact location in Fargo again confirms his information to be reliable at least to the point of establishing reasonable suspicion for the officers to stop the defendant and inquire further to see if criminal activity was afoot.

[¶ 23] A third specific source of information regarding Jesse was his ex-wife Mindy Anderson. (Tr. p. 48, l. 1-5). Although Mindy Anderson did not provide any information specific to the day in question, she did provide information to Deputy Gress which was valuable to assess Jesse’s dangerousness. (Tr. p. 48, l. 1-5). As was stated in City of Fargo v. Ovind, in determining whether an investigative stop is valid the court must use an objective standard under the totality of the circumstances. 1998 ND 69, ¶8, 575 N.W.2d 901, 903 (upholding law enforcement’s ability to “freeze” the scene based on reasonable suspicion). In this particular case, the totality of Deputy Gress’ information was sufficient to establish reasonable suspicion to detain and investigate the situation.

[¶ 24] C. The police officers had reasonable and articulable suspicion to consider the defendants to be armed and dangerous justifying their detention pending further investigation and justifying the search of the vehicle.

[¶ 25] When a search or seizure is done for its immediate objective of searching for a weapon the United States Supreme Court has struck a balance to allow “the weighty interest in the safety of the police officers to justify warrantless searches based only on a reasonable suspicion of criminal activity.” New York v. Class, 475 U.S. 106, 117 (1986). The North Dakota Supreme Court has also recognized such warrantless searches for both an individual and a vehicle if the officer possesses an “articulable suspicion that the individual is armed and dangerous” or if a person is outside a vehicle, the officer possesses “a reasonable belief that a person poses a danger if allowed to re-enter the vehicle.” State v. Haverluk, 2000 ND 178, ¶¶ 22-23, 617 N.W.2d 652, 657. (stating such a vehicle search must be restricted to areas of the vehicle within the individual’s immediate control and to areas that could contain a weapon).

[¶ 26] The same reasons that gave the officers reasonable suspicion to stop the defendants also gave the officers reasonable suspicion to believe the defendants were armed and dangerous which would allow the officers to detain and search the defendants. Id. (citing Pennsylvania v. Mims, 434 U.S. 106, 108-11 (1977)). Additionally, the same reasonable suspicion would allow the search of the vehicle for such a limited purpose of finding weapons. Haverluk, 2000 ND at ¶ 22. In this case, the officer’s suspicions continued to be confirmed by noticing Jesse was wearing body armor consistent with their initial information. (Tr. p. 19, l. 1-11). Jesse also confirmed there was a weapon in the vehicle when he responded to the officers questions. (Tr. p. 37, l. 3-7). As the trial court noted, such a question pre-Miranda should not result in suppression given the

officer's question falls within the public safety exception. See State v. Connery, 441 N.W.2d 651, 653-4)(citing New York v. Quarles, 467 U.S. 649, 656 (1984))(holding even though the defendant was "in custody" the statement was admissible based on officer safety).

[¶ 27] When the officers did search the defendant's vehicle the scope of the search was properly limited to the areas within the immediate control of the defendant because the area searched was the area directly behind the driver seat and the console between the driver and passenger seat. Haverluk, 2000 ND at ¶ 22. The officer also testified that the uncased "AK-47" was laying in plain-view once he opened the rear passenger door. (Tr. p. 21, l. 1-20). The illegal method of transportation of the uncased "AK-47" and other illegal weapons found in the vehicle gave rise to probable cause to arrest the defendants.

[¶ 28] The defendants also argue the officers show of force was overly intrusive. However, as pointed out in Heitzmann when law enforcement is faced with threatening conduct officers are entitled to take reasonable steps to protect themselves. 2001 ND at ¶18. (stating officers may proportionately respond to the actions of a suspect). The trial court in this case found such officers conduct "appropriate" in light of the circumstances. (Appellant's Appendix p. 11-12). Therefore, given the officers information and their reasonable conduct under the circumstances they were justified in their detention of the defendants and the subsequent search of the vehicle.

[¶ 29] **II. The Fargo officers had probable cause to arrest the defendants for Possession of Concealed weapons.**

[¶ 30] Since the officers had reasonable suspicion for the stop and reasonable suspicion to believe the defendants were armed and dangerous they were justified in

opening the door to the vehicle and its subsequent search for weapons. Haverluk, 2000 ND at ¶ 22. However, before even the officers searched the vehicle they immediately noticed a violation of law by simply opening the door and seeing the weapon in plain-view which again confirmed the information they had received and also raised the level of constitutional permitted activity. State v. Langseth, 492 N.W.2d 298, 299-300 (N.D.1992) (stating a public encounter does not foreclose the officer from making observations that reasonably lead to further action). If an officer learns something during an encounter with a person that causes reasonable suspicion or probable cause, the encounter can justify further investigation, seizure, and even arrest. Id. In this case, after the officers found the weapons in the vehicle they certainly had probable cause to arrest the defendants for possession of concealed weapons.

[¶ 31] The defendants cite State v. Linghor and Jamestown v. Jerome, for the proposition that the defendants were arrested before probable cause was established hence making such arrest illegal. 2004 ND 224, 690 N.W.2d 201; 2002 ND 34, 639 N.W.2d 478. However, Linghor is distinguishable from the current case in that the officers in this case had a reasonable suspicion to believe the defendant's were armed and dangerous. That factor alone puts this case in line with the rationale of Mimms as expressly adopted in Haverluk which justifies the officers ordering the defendants out of the vehicle and its subsequent search. 2000 ND at ¶ 20-22.

[¶ 32] CONCLUSION

[¶ 33] The trial court evaluated the credibility of all the witnesses and found the officers conduct reasonable and justified under the totality of the circumstances. Because

the officers conduct was reasonable and was in line with North Dakota's Constitution the trial courts ruling should be affirmed.

Respectfully submitted this 12th day of November, 2005.

Aaron G. Birst, NDID #05820
Assistant State's Attorney
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850

[¶ 34] CERTIFICATE OF SERVICE

A copy of this document was e-filed, pursuant to Administrative Order 14, to the North Dakota Supreme Court, Jesse Lange and Monty Mertz on the 12th of November 2005, served electronically upon:

The North Dakota Supreme Court
supclerkofcourt@ndcourts.com

Jesse Lange – Attorney for Jesse Anderson
jesse@lariveeandlight.com

Monty Mertz – Attorney for Daniel Anderson
MGMNDLAW@aol.com

Aaron G. Birst