ORIGINAL

IN THE SUPREME COURT 20050451

STATE OF NORTH DAKOTA

SUPREME COURT NO. 20050451

CASS COUNTY DISTRICT COURT NO. 09-05-K-02197

State of North Dakota,

Plaintiff and Appellee,

vs.

Jason Wayne Oien,

Defendant and Appellant.

APPELLANT'S BRIEF

APPEAL FROM THE CRIMINAL JUDGMENT AND COMMITMENT
ENTERED ON
22 DECEMBER 2005
IN THE EAST CENTRAL DISTRICT COURT, IN FARGO, CASS COUNTY
STATE OF NORTH DAKOTA
THE HONORABLE GEORGIA DAWSON, PRESIDING

Mark A. Beauchene (ID #03546)
Wold Johnson, P.C.
400 Gate City Building
P.O. Box 1680
Fargo, North Dakota 58107-1680
701-235-5515
Attorney for Defendant-Appellant

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STATEMENT OF THE CASE

The Defendant was charged pursuant to an Information dated June 22, 2005, with possession of a controlled substance with intent to deliver, a class "B" felony and possession of drug paraphernalia, a class "A" misdemeanor. (Appendix at page 4). On August 29, 2005, the Defendant filed his Motions to Suppress and Notice of Motion alleging violations of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution. The Defendant sought suppression of all evidence found during and subsequent to a warrantless entry and search on the grounds that the police did not have a search warrant to enter the home and that an exception to the warrant requirement did not apply. (Appendix at page 6).

The Defendant's Motions to Suppress came on before the Court on the 9th day of November, 2004, the Honorable Georgia Dawson, District Judge, presiding. The Court received testimony and, ruling from the bench, denied Defendant's Motions to Suppress. An Order dated November 18, 2005, followed wherein Defendant's Motions to Suppress were denied. (Appendix at page 8).

Pursuant to Rule 11(a)(2) of the North Dakota Rules of Criminal Procedure, the Defendant moved the Court to receive a conditional plea of guilty, reserving the right to appeal. (Appendix at page 9).

A Criminal Judgment and Commitment dated on filed on December 22, 2005, sets out the sentence of the Defendant on both counts of the Information. (Appendix at page 11).

The Defendant's Notice of Appeal was filed on December 22, 2005, appealing this matter to the North Dakota Supreme Court.

STATEMENT OF THE FACTS

On June 20, 2005, Ms. Vicki Heilman, agent for the Housing Authority of Cass County, received an anonymous telephone call. The caller indicated that the Defendant, Mr. Oien, was at the residence of Ms. Sarah Jones. (Tr. p. 5, lines 20-23). Ms. Jones had previously been given notice that the Defendant was trespassed from her apartment. A trespass notice had also been sent to the Defendant by letter addressed to the Defendant's mother. (Tr. p. 7, lines 10-18). The anonymous caller also told Ms. Heilman that the Defendant possessed a large quantity of marijuana hidden in a bedroom closet. (Tr. p. 35, lines 15-21).

Ms. Heilman called the West Fargo Police Department to request assistance. Ms. Heilman requested that the West Fargo Police Department escort her to the apartment of Sarah Jones for her safety. Ms. Heilman testified that her concern was because there had been previous reports of domestic violence. (Tr. p. 9, lines 9-18).

With West Fargo Police Officer Gary Bommersbach beside her, Ms. Heilman knocked at Ms. Jones' apartment. A worker doing some repair work in the kitchen came to the door and told them to go around to the front door. Ms. Heilman told him that she was coming through the back door. (Tr. p. 10, lines 13-19).

Ms. Heilman entered Ms. Jones' home with Officer Bommersbach behind her.

Ms. Heilman called for Ms. Jones as she walked into the living room. With Officer Bommersbach still behind her, a door was heard to open and Ms. Jones was observed at the top of the stairway.

Ms. Heilman asked Ms. Jones if they could search the apartment two times. Ms. Jones stated no the first two times. On the third request to allow them to search the

apartment. Ms. Heilman told Ms. Jones that it would look better for her to let them search. Further, Ms. Jones was advised by Ms. Heilman that her housing would be in jeopardy and that she would be subject to a three-day eviction notice if she would not agree to the search. (Tr. p. 17, lines 11-25, page 18, lines 1-4).

Ms. Jones then replied: "Go ahead, look." (Tr. p. 13, lines 19-20). Ms. Heilman motioned for Officer Bommersbach to follow her and they went upstairs. (Tr. p. 13, lines 23-24).

At this point, Officer Bommersbach testified that: "We are looking for Jason, yes." (Tr. p. 28, lines 15-17). Officer Bommersbach testified that they first looked in the bathroom, then a bedroom, before finding the Defendant hiding in the closet of another bedroom. A mattress had been pushed against the closet door. Officer Bommersbach moved the mattress back, looked into the closet, and saw the Defendant crouched down with his hands over his head. (Tr. p. 29, lines 2-25).

Officer Bommersbach ordered the Defendant to get out of the closet. The officer did a quick pat down for weapons. He then smelled what he believed to be marijuana coming from the closet area. Officer Bommersbach found a metal cake pan in the area behind where the Defendant had been crouched in the closet. The cake pan was full of marijuana. (Tr. p. 30, lines 1-18).

ARGUMENT

I. Whether the trial Court erred in concluding that the Defendant did not have standing to seek suppression of evidence alleged to have been seized in violation of his constitutional rights.

The Defendant's Motions to Suppress were heard by the District Court on November 9, 2005. The Defendant asserted that his rights under the Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution had been violated as law enforcement did not have grounds to enter the home of Sarah Jones. It was undisputed that the Defendant was an overnight guest of Ms. Jones. Ms. Jones testified as follows:

Q: Just a couple of questions. On June 20, 2005, when the police entered, was he an invited guest of yours?
A: Yes.
Q: So you invited him over there?
A: Yes I did.
Q: And his daughter is there also?
A: Yes. She is always with me.
Q: And approximately how long was he there before the police came? On that day in question?
A: He had spent the night that night.
Q: So, he's an overnight guest?
A: Yeah.
Q: And you specifically invited him over?
A: Yes I did.

(Tr. p. 42, lines 23-25, and p. 43, lines 1-11).

Under North Dakota law, an overnight guest has standing to seek suppression of evidence seized based upon an illegal entry into the premises. In the case of *State v. Ackerman*, 499 N.W.2d 882 (N.D. 1993) the Court held that Ackerman, as a guest in the trailer, had standing to seek suppression of evidence seized in the trailer. Ackerman was a guest, but not an overnight guest, at the trailer home. Even so, the Court held that: "Such a guest, however, need not expect a police officer to enter and search without either consent or a warrant, absent the immediate commission of a crime." Id. at 885.

Later, in the case of *State v. Avila*, 1997 N.D. 142, 566 N.W.2d 410 (N.D. 1999), Avila argued that he had standing to raise the Fourth Amendment issues as an apartment

guest. The *Avila* court held that: "... it is undisputed in this case that, under *Ackerman*, Avila has standing to seek suppression of the incriminating evidence." Id. at 413.

Nevertheless, the District Court reasoned that because the Defendant had criminally trespassed on the property of the Housing Authority of Cass County, the Defendant's status was that of a trespasser and, therefore, had no standing to object to the search.

The Defendant recognizes that this Court will generally defer to the trial court's Findings of Fact in reviewing a denial of a suppression motion. However, questions of law are fully reviewable. See, *State v. Bartelson*, 2005 N.D. 172, 704 N.W.2d 824 (2005).

The question of whether the Defendant has standing to challenge the legality of the entry and search in this matter is a question of law fully reviewable by the Court.

The Court received State's Exhibit #1, a letter dated March 1, 2005, from Vicki Heilman addressed to Ms. Sarah Jones on behalf of the Housing Authority of Cass County. (Appendix at page 14). The letter advised Ms. Jones the Defendant was criminally trespassed from Ms. Jones' residence, a property controlled by the Housing Authority of Cass County. Ms. Jones acknowledged that she had been given verbal and written notification that the Defendant was trespassed from the property. However, she testified that she never told the Defendant of such notification.

Q: And you received both verbal and written notification from Ms. Heilman that Jason was not to be on the premises, right?
A: Yes.
Q: And you knew that he was trespassed from the premises?
A: Yes.
Q: And you communicated that to Jason?
A: No, I didn't actually tell him because I wanted him to come around. I didn't think he would get in trouble.
Q: So, you were given verbal notification that he was trespassed from the premises -

MR. EDINGER: I guess I'm going to object because, once again, it's not relevant to standing, because he is in this apartment as a guest of this tenant. That's my objection again.
THE COURT: Overruled. Go ahead, ask the question.

Q: So, you were given verbal notification that Jason was trespassed from the property?
A: Yes.
Q: You were given written notification that he was trespassed from the property?
A: Yes.
Q: You knew you were in jeopardy of losing your housing if he was found on the property?
A: Yes.
Q: And yet you didn't bother to tell him, that he wasn't supposed to come around?
A: No.
Q: Despite the fact that you and your three-year-old daughter would have been homeless if he would have been found at your apartment? Is that true?
A: Yes.
Q: So, your testimony today is that you never told Jason that he was trespassed from the premise?

MR. EDINGER: Once again, I'm going to object, Your Honor. It's not relevant.
MS. PETERS: It's relevant to his being notified that he has been trespassed from the property. Ms. Heilman --
THE COURT: Answer the question if you know the answer. I guess you would know the answer.

A: Yes.
Q: You never told him?
A: No.

(Tr. p. 45, lines 20-25; p. 46, lines 1-25; and p. 47, lines 1-13).

The District Court had previously heard the testimony of Vicki Heilman, Community Manager for the Housing Authority of Cass County. When asked whether the Defendant was given notice of being criminally trespassed from Ms. Jones' residence, Ms. Heilman testified that: "I sent it to what I believed to be his mother's address out of the phonebook." (Tr. p. 7, lines 17-18). There is no evidence in the record that the Defendant's mother communicated this trespass notice to the Defendant in any way. Furthermore, there

is nothing in the record that the Defendant ever received actual notice of the trespass notice in any way.

Nevertheless, the Court made the following finding:

> The Court, first of all, is going to make a finding specifically that it's not plausible that the Defendant did not know that he was not to be on the property. The Court has in front of it, State's Exhibit #1, which was given to Ms. Jones on March 1, 2005. She was actually served with it, and this alleged violation occurred on or about June 20, 2005. It is uncontroverted that a copy was sent to his mother's place, which according to this witness, he resides sometimes. I think that the landlord did what she could in order to make sure that this Defendant knew he was not to be on the property, as her lease allows her to do.

(Tr. p. 59, lines 11-22).

While it is undisputed that Ms. Jones had notice of the trespassing order, there is no evidence to support the finding that the Defendant had actual notice of the Trespass Order.

Pursuant to N.D.C.C. § 12.1-22-03, a person is guilty of a class B misdemeanor if he enters or remains in any place as to which notice against criminal trespass is given by actual communication to the actor by the person in charge of the premises or other authorized person.

In the present case, there is no evidence that the Defendant had been given notice against trespass by actual communication as required by statute. Therefore, an essential element of the charge of criminal trespass was wholly lacking.

In summary, it is undisputed that the Defendant was an invited overnight guest of Ms. Jones. There is no evidence that the Defendant received actual notice of the Trespass Order. Without such actual notice, the Defendant could not be deemed to be trespassing.

Accordingly, the Defendant asserts that he has standing to seek suppression of the evidence seized in violation of his constitutional rights in this matter.

II. Whether the Court erred in denying Defendant's Motion to Suppress grounded upon a warrantless entry into the home of Sarah Jones.

On June 20, 2005, Ms. Vicki Heilman received an anonymous phone call. The caller said that the Defendant was in the home of Sarah Jones. The anonymous caller also indicated that there possibly was a large amount of marijuana at Ms. Jones' apartment in a bedroom closet. Armed with this information from the anonymous caller, Ms. Heilman called the West Fargo Police Department "to be escorted to the apartment". (Tr. p. 9, lines 5-11).

Ms. Heilman previously testified that she requested an escort from the West Fargo Police Department "For my safety." (Tr. p. 9, line 14). Officer Bommersbach testified that his sole purpose for being there was: "basically, we got asked by Vicki to be there for her protection." (Tr. p. 26, lines 12-13). Officer Bommersbach denied that he was there for any kind of investigation or search. (Tr. p. 27, lines 4-7).

West Fargo Police Officer Gary Bommersbach accompanied Ms. Heilman to Ms. Jones home. Upon arriving at Ms. Jones' home, Ms. Heilman testified:

> A: I knocked on the door loudly, and a worker who was doing some repair on the kitchen ceiling came to the door and opened it.
> Q: And then what happened next?
> A: And then I asked if Sarah was there, and he said we should go around to the front door. And I told him we were coming through the back door.

(Tr. p. 10, lines 13-19).

Officer Bommersbach agreed that he did not have a search warrant to enter the apartment nor was there any emergency or exigent circumstances to enter the apartment. (Tr. p. 31, lines 15-20). This Court has noted on numerous occasions that physical entry of a home is the chief evil against which the wording of the Fourth Amendment is directed. In

the case of *State v. Keilen*, 2002 N.D. 133, 649 N.W.2d 224 (N.D. 2002), the Court stated as follows:

> An individual is 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 Forth Amendment is directed." Payton v. New York, 455 U.S. 573, 585 380 N.E.2d 224 (N.Y. 1978). "[T]he Fourth Amendment has drawn a firm line at the entrance to the house." Id. at 590. "Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Id. 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 into a home." Kirk v. Louisiana, 122 S.Ct. 2458, 773 So.2d 259 (L.A. 2000). Under Payton, "[w]arrantless searches and seizures inside a home are presumptively unreasonable." City of Fargo v. Lee, 1998 N.D. 126 ¶ 8, 580 N.W.2d 580. See also State v. Kitchen, 1997 ND 241, ¶ 13, 572 N.W.2d 106 (N.D. 1997).

Id. at 228. See, also, *City of Jamestown v. Dardis*, 2000 N.D. 186, 618 N.W.2d 495 (N.D. 2000); *City of Fargo v. Ellison*, 2001 N.D. 175, 635 N.W.2d 151 (N.D. 2001); and *State v. Ackerman*, 499 N.W.2d 882 (N.D. 1993).

Despite the lack of a search warrant or exigent circumstances, the District Court found that Officer Bommersbach was performing a community caretaking function. (Tr. p. 60, lines 2-4).

This Court has addressed the community caretaking issue relating to a home on two occasions. In the case of *State v. DeCoteau*, 1999 N.D. 77, 592 N.W.2d 579 (N.D. 1999), the Court held that there was no community caretaking role to fill by the police by entering the home. In the *DeCoteau*, the police were called to investigate an anonymous tip concerning a domestic disturbance. Upon arriving at the scene there was no disturbance whatsoever. Furthermore, the police were told by one of the residents that she did not need

or request police assistance. In reversing the decision of the District Court, the *Decoteau* court held that there was no community caretaking role to fill by entering the home.

In the case of *State v. Keilen*, 2002 N.D. 133, 649 N.W.2d 224 (N.D. 2002), police officers were dispatched to an apartment building to investigate a report of a domestic dispute. When the officer arrived he spoke with a neighbor who reported hearing yelling, fighting, and a loud crash. The neighbor told the officer "he was afraid someone was hurt." Id. at 226. The officer went to the door of the apartment of the alleged disturbance and knocked on the door. After some time and no response, the officer and his partner entered the apartment. Once inside, the two officers were told that they were not in need of assistance. Upon interviewing the occupants of the apartment, a third officer arrived and observed marijuana and marijuana paraphernalia in plain view within the apartment. A search warrant was obtained for the apartment followed by a search and seizure of contraband. The trial court denied the Motion to Suppress finding that the conduct of the officers' was justifiable under the community caretaker exception to the warrant clause of the Fourth Amendment. The State argued that the exclusion of such evidence would discourage law enforcement from fulfilling its recognized community caretaker function. Id. at 229. In reversing the decision of the trial court, the court held that the community caretaking function did not apply.

The *Keilen* court stated as follows:

> As in DeCoteau, when the Fargo police officers arrived at Keilen and Dykhoff's apartment, there was not a disturbance. See id. Although the officer could hear movement and voices from within the apartment, the officer did not testify he believed anyone inside was injured. Rather, the officer testified he merely wanted "to check to see if everyone was all right." This is not sufficient under the circumstances. In order to enter a home the police need a warrant or probable cause plus exigent circumstances. Payton, 445 U.S. at 590, 380 N.E.2d 224 (N.Y. 1978); Kirk, 122 S.Ct. 2458, 773

> So.2d 259 (L.A. 2000). In this case, the police did not have a warrant and the trial court determined exigent circumstances did not exist. Because there was no disturbance when the officers arrived, and it was not discernible to the officers that anyone required assistance, the community caretaking function does not apply.

In the case of *City of Jamestown v. Jerome*, 2002 N.D. 34, 639 N.W.2d 478 (N.D. 2002). Jamestown police received a dispatch relaying an anonymous tip that the defendant was intoxicated and driving her vehicle. Officer Shahin parked his vehicle and approached the defendant asking if he could speak to her for a minute. The trial court found that Officer Shahin was merely conducting a caretaking activity when he talked with Jerome. In disagreeing with the trial court's finding, the court in *Jerome* stated the following:

> We disagree with the trial court's finding that Shahin, in talking with Jerome, was conducting a community caretaking function. The community caretaking function is an activity "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." State v. Langseth, 492 N.W.2d 298, 300 (N.D. 1992). Shahin's request to talk with Jerome does not fall within the "community caretaking" role, because his objective was to investigate the possibility of a law violation, not to help a person in possible need of assistance. In circumstances where it is obvious that a citizen is neither in need of nor desires assistance there is no community caretaking role to fill. State v. DeCoteau, 1999 N.D. 77, ¶ 21, 592 N.W.2d 579.

Id. at 481.

In the present case, Officer Bommersbach testified that he accompanied Ms. Heilman for her protection. The anonymous caller had previously provided Ms. Heilman with information that the Defendant was at the Jones' residence and that he had a quantity of marijuana in the bedroom closet. Furthermore, Officer Bommersbach was advised that the Defendant may be in violation of a trespass notice of the Housing Authority. There was not disturbance, only a concern for Ms. Heilman's safety. Such concern would not justify the warrantless entry into the home of Ms. Jones absent exigent circumstances. Officer

Bommersbach was obviously at the residence of Ms. Jones to help Ms. Heilman find the Defendant who may be in violation of a trespass notice. However, no crime had been committed in the presence of Officer Bommersbach. He was there to potentially enforce a class B misdemeanor, criminal trespass, should the Defendant be found.

The case of *City of Fargo v. Lee*, 198 N.D. 126, 580 N.W.2d 580 (N.D. 1998) is on point. The *Lee* court stated as follows:

> The trial court considered the fraternity residents' reasonable expectation of privacy when making its findings. The trial court found the door of the fraternity house was shut, and the officers' entry into the house was an intrusion. The trial court found the officers entered the fraternity house without a warrant and without an exception to the search warrant requirement. While the trial court did not make a specific finding on the absence of exigent circumstances, such a finding is implicit in the trial court's broader ruling.
>
> The City of Fargo argues crimes being committed in their presence creates exigent circumstances. The City relies on N.D.C.C. § 29-06-15 authorizing a law enforcement officer to make an arrest without a warrant if an offense is committed in the officer's presence. However, this statute does not authorize a warrantless entry into a home to search. See *State v. Ackerman*, 499 N.W.2d at 885-886 (holding no exigent circumstances existed when police officers responded to loud music complaint, smelled marijuana, entered the home without consent, and did not immediately arrest for an offense committed in their presence).
>
> The only crimes being committed in the officers' presence were class B misdemeanors, relatively minor infractions. The United States Supreme Court stated in *Welsh v. Wisconsin*, 466 U.S. at 753, 321 N.W.2d 245 (W.I. 1982), "applications of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense ... has been committed." We do not believe the crimes allegedly being committed here created exigent circumstances justifying entering the ATO house to search for evidence. The trial court's finding that no exception to the warrant requirement existed is not against the manifest weight of the evidence.

Id. at 582.

Under the facts and circumstances presented in this case, the community caretaking function would not justify the warrantless entry of Ms. Jones' home by Officer Bommersbach.

The State further argued that even if Officer Bommersbach made an illegal entry into the home of Ms. Jones, she subsequently consented to the search of her residence. The district court, however, made no findings whatsoever concerning the issue of consent. The findings of the District Court simply stated that "the officer only discovered the marijuana in plain view after he discovered the Defendant crouching down in the closet." (Tr. p. 60, lines 20-22). This finding is not supported by the evidence.

With Officer Bommersbach right behind her, Ms. Heilman asked Ms. Jones several times if "we could search". (Tr. p. 16, lines 13-17). Ms. Jones said "No" the first two times when asked for her consent to search. (Tr. p. 17, lines 6-7). Ms. Heilman then told her that her housing would be in jeopardy and that it would look better for her to cooperate. (Tr. p. 17 lines. 22-25). Ms. Jones was also told that if she did not agree to the search that she would be subject to a three-day eviction notice. (Tr. p. 18, lines 1-3). Ms. Jones testified that she felt threatened and, further, that she did not have a choice but to give her consent to search. (Tr. p. 45, lines 1-6).

Officer Bommersbach testified:

Q: And where do you search before you search the back bedroom?
A: The first door that you come to at the top of the stairs I believe was the bathroom. We looked in the bathroom. The room right to your right of the bathroom was another bedroom. I think that looked like the child's bedroom. We looked in there. And then the next door was down the hallway, was a linen closet. And then the final door led into the back bedroom.
Q: And once you got into the back bedroom, who was there?
A: Sarah and her daughter.
Q: And anybody else in that bedroom?

A: We found, not in plain view there wasn't. But we did find Jason hiding in the closet.
Q: And how did you go about finding him?
A: There was a mattress, which had been – the door on the closet was actually open. It was just a walk-through door to go into the closet, and that was open. But there had been a mattress pushed again (sic) the open door. Not the door, but the opening of the door. And we moved the mattress back and looked into the closet, and Jason was crouched down with his hands over his head, in the – as I was facing the closet, it would be the left-hand corner of the closet.
Q: Did you recognize him?
A: Not immediately. I just ordered him to get out of the closet.
Q: Did you recognize him after he got out of the closet?
A: Yes. We identified him as Jason.
Q: Did you ask him what he was doing in the closet?
A: Yes I did.
Q: And what did he say?
A: He said he was adjusting something in there.
Q: Did you talk to him after that?
A: Yes. I think what I did, when he initially got out I did a quick pat down on him to make sure there was no weapons. And when I looked into the closet when he was in there, first off, I could smell what known to me is marijuana. Ray marijuana not burnt marijuana smell, coming from the closet area. And behind Jason, where he was crouched down, there was a metal cake pan, sitting behind him, and another box was in there. And inside the box it looked like, the case pan was full of marijuana, and then probably about a ten inch knife.
Q: So, you observed all these things after or before Jason had gotten out of the closet?
A: I seen the pan in the closet as he was getting out.
Q: So, once he got out of the closet, then what happens next?

(Tr. p. 25, line 25; p. 29, lines 1-25; p. 30, lines 1-22).

While consent is one of the exceptions to the warrant requirement, the trial court needs to determine whether the consent was voluntary under the totality of the circumstances. See, *State v. Avila*, 1997 N.D. 142, 566 N.W.2d 410 (N.D. 1997). In the recent case of *State v. Smith*, 2005 N.D. 21, 691 N.W.2d 203 (N.D. 2005), the court set out the applicable test in determining where there was a valid search based upon consent. The court stated:

> The State argues the consent was purged of the unlawful stop because it was given voluntarily as defined in *United State v. Beason*, 220 F.3d 964, 967 (8th Cir. 2000). We use the totality-of-the-circumstances test to determine whether consent is given voluntarily. *State v. Mitzel*, 2004, ND 157, ¶ 25, 685 N.W.2d 120 (N.D. 2004); *City of Fargo v. Ellison*, 2001 ND 175, ¶ 13, 635 N.W.2d 151. In *Beason*, the Eighth Circuit said an act of free will by the defendant may purge the primary taint of the unlawful stop. 220 F.3d at 967. The court said that to determine whether the consent was voluntary, a court examines the totality of the circumstances. Id. *Beason's* singular totality-of-the-circumstances approach, however, was abandoned in *United States v. Becker*, 333 F.3d 858, 862 n. 4 (8th Cir. 2003). In *Becker*, the court opined that "voluntary consent to a search, preceded by an illegal police action, does not automatically purge the taint of an illegal detention. Id. at 862; see also 3 Wayne R. LaFave, *Search and Seizure: A Treaties on the Fourth Amendment*, § 8.2 (d) at 656 (3rd ed. & Supp. 2004); *United States v. Santa*, 236 F.3d 662, 676-77 (11th Cir. 2000). A second inquiry is necessary to determine whether the taint is purged from the evidence seized during the allegedly unlawful detention by considering the "following factors: (1) the temporal proximity between the illegal search or seizure and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." *Becker*, 333 F.3d at 862; see also *United States v. Portillo-Aguirre*, 311 F.3d 647, 659 (5th Cir. 2002); *Commonwealth v. Freeman*, 563 Pa.82, 757 A.2d 903, 909 (2000); *State v. Phillips*, 218 Wis.2d 180, 577 N.W.2d 794, 805-06 (1998); *United States v. Melendez-Garcia*, 28 F.3d 1046, 1054 (10th Cir. 1994). If the consent is not purged of the unlawful detention, it is still fruit of the poisonous tree. *United States v. Cellitti*, 387 F.3d 618, 623 (7th Cir. 2004); *United States v. Lopez-Arias*, 344 F.3d 623, 629 (6th Cir. 2003); *United States v. Chavez-Villarreal*, 3 F.3d 124, 127-28 (5th Cir. 1993); *State v. Pau'u*, 72 Haw. 505, 824, P.2d 833, 836 (1992).

Id. at 211-212.

In *Smith*, the court noted that the District Court did not determine the stop to be unlawful and, therefore, did not address the issue of whether the defendant's consent to search was voluntary and whether the consent was purged from the taint of the unlawful stop. In the present case, similarly, the District Court did not determine the entry to be unlawful and, therefore, did not address these issues either. The court in *Smith* directed the District Court to: "determine whether the consent to search the car was voluntary in view of

the unlawful stop and, if so, was sufficiently purged of the taint from the unlawful stop." Id. at 212.

Likewise, on the consent issue, this court should remand this matter to the District Court for proceedings consistent with the directives noted above in *Smith*.

CONCLUSION

There is no evidence on the record showing that the Defendant had been given actual notice against trespass. Lacking actual notice, the Defendant could not be in violation of the criminal trespass statute. Accordingly, the finding of the District Court that the Defendant lacked standing as a result of being a trespasser upon the property is clearly erroneous. The Defendant has standing as an overnight guest of Ms. Jones. The warrantless entry into the home of Ms. Jones was made absent exigent circumstances. The community caretaking exception in inapplicable as no one other than Ms. Heilman requested assistance from law enforcement. Officer Bommersbach's presence was not totally deforced from detection, investigation, or acquisition of evidence. He was there to find and arrest Mr. Oien for criminal trespass. He was also mindful of the anonymous caller's information that a large quantity of marijuana could be found in a bedroom closet. Ms. Jones' consent to search is tainted by the illegal entry. The District Court did not make any findings to determine whether the taint is purged from the evidence seized following the illegal entry.

Accordingly, this honorable Court should reverse the convictions herein and remand this matter for further proceedings.

Respectfully submitted this 14th day of February, 2006.

WOLD JOHNSON, P.C.

Mark A. Beauchene (ID #03546)
A Member of the Firm
400 Gate City Building
P.O. Box 1680
Fargo, North Dakota 58107-1680

20050451

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

AFFIDAVIT OF SERVICE

BY MAIL

FILE NO. SUPREME COURT 20050451
FILE NO. CASS COUNTY 09-05-K-02197

Dawn Cruz-Schares, being first duly sworn, deposes and says that on February 14, 2006, she served the attached Appellant's Brief and Appendix on Tracy Jo Peters, attorney for the State, by placing a true and correct copy thereof in an envelope addressed as follows:

Ms. Tracy Jo Peters
Cass County State's Attorneys Office
P.O. Box 2806
Fargo, ND 58108-2806

And depositing the same, with postage prepaid, in the United States mails at Fargo, North Dakota.

Dawn Cruz-Schares

Subscribed and sworn to before me this 14th day of February, 2006.

(Seal)
MICHELLE M. HOPPE
Notary Public
State of North Dakota
My Commission Expires May 31, 2011

20050451

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

AFFIDAVIT OF SERVICE BY MAIL

FILE NO. SUPREME COURT 20050451
FILE NO. CASS COUNTY 09-05-K-02197

Dawn Cruz-Schares, being first duly sworn, deposes and says that on February 17, 2006, she served the attached corrected Appellant's Brief pages on Tracy Jo Peters, attorney for the State, by placing a true and correct copy thereof in an envelope addressed as follows:

Ms. Tracy Jo Peters
Cass County State's Attorneys Office
P.O. Box 2806
Fargo, ND 58108-2806

And depositing the same, with postage prepaid, in the United States mails at Fargo, North Dakota.

Dawn Cruz-Schares

Subscribed and sworn to before me this 17th day of February, 2006.

(seal)

LORETTA K ASKEW
Notary Public
State of North Dakota
My Commission Expires Nov. 20, 2008