

ORIGINAL

IN THE NORTH DAKOTA SUPREME COURT

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MAY 17, 2006

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STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff/Appellee,)	
)	
vs.)	
)	
Jami Woinarowicz,)	Dist. Ct. Nos. 05-K-1359
)	Supreme Ct. Nos. 20060032
)	
Defendant/Appellant.)	
_____)	

APPEAL OF ORDER DENYING MOTION TO SUPPRESS ENTERED OCTOBER 25, 2005
AND JUDGMENT ENTERED JANUARY 23, 2006 CASS COUNTY DISTRICT COURT
THE HONORABLE GEORGIA DAWSON, PRESIDING

REPLY BRIEF OF APPELLANT

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Table of Contents

Table of Authorities.....ii

Defendant’s Rebuttal Argument.....1

Conclusion.....4

Table of Authorities	Page
<i>In re L.B.B.</i> 2005 ND 220, 707 N.W.2d 469	2
North Dakota Rules of Evidence	
Rule 1101.....	1, 2
Rule 801.....	2

The Defendant provides the following argument in reply to the State's Brief.

The State argues that hearsay statements are admissible at suppression hearings. State's Brief at ¶ 29. The State cites no North Dakota case, statute or rule of evidence to support that claim. However, Rule 101 provides the scope of the North Dakota Rules of evidence. "These rules govern proceedings in the courts of North Dakota, to the extent and with the exceptions stated in Rule 1101." NDR. Evid. 101. Rule 1101 of the North Dakota Rules of Evidence specifies the applicability of the Rules of evidence.

(a) Courts and Magistrates. These rules apply to all courts and magistrates of this State.

(b) Proceedings Generally. These rules apply generally to all civil actions, special proceedings, and criminal actions and to contempt proceedings except those in which the court may act summarily.

(c) Rules of Privilege. The rules with respect to privileges apply at all stages of all actions, cases, and proceedings.

(d) Rules Inapplicable. The rules, other than those with respect to privileges, do not apply in the following situations:

(1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(2) *Grand Jury.* Proceedings before grand juries.

(3) *Miscellaneous Proceedings.* Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or

revoking probation or parole; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise, detention hearings, transfer and dispositional hearings in juvenile court, and proceedings conducted in accordance with Section 14-17-09, and Chapter 27-05.1, N.D.C.C.

NDR. Evid. 1101. *See In re L.B.B.* 2005 ND 220, 707 N.W.2d 469 ¶¶ 15, 16, 17 (Sandstrom, J. concurring). The applicable subpart in the present case is (3) which does not exclude criminal suppression hearing. Rule 801 of the North Dakota Rules of Evidence also indicates that hearsay is not admissible at a trial or *hearing*. *See* NDR Evid. 801 (c).

The Rules of Evidence therefore apply to criminal motion/suppression hearings and as such hearsay is not allowed. Thus, the State is incorrect in its assertion that hearsay is permissible.

A hearsay statement is an out of court statement offered for the truth of the matter asserted. *See* NDR. Evid. 801(c) Rule 801 specifies, in pertinent part:

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

The real question and argument at this point is the State's dance around the purpose of the statement. In the motion hearing the issue was consent to enter the motel room. The testimony from Officer Stanger specifically addressed the consent issue. Thus, was it true that Mr. Novak granted consent to Stanger to enter? The statement was offered as an 1) out of court statement, it was offered to prove that Mr. Novak granted consent, 2) the truth of the matter, Stanger testified that he was granted consent, 3)

asserted by Stanger. Clearly under Rule 801 (c) this is hearsay and should not have been accepted by Judge Dawson. That the Court claims that she did not consider it for the truth of the matter asserted is contrary to her decision since she found that Mr. Novak gave consent despite testimony from the Defendant that contradicted Officer Stanger's very words.

The State advances the notion that why else would Stanger enter the motel room? State's Brief at ¶ 41. This Court should not lose sight of the facts the Officers were told-namely that a motel security guard had seen someone enter the room with a gas can and 22" pvc pipe, that a woman in the room seemed to be under the influence of drugs. None of these claims were shown to be true. Defendant testified that the officers pushed in the door knocking Mr. Novak away from the door and entered the motel room. The Officers clearly believed that the room contained a meth lab and they were going to enter the room regardless of whether they received consent or not and that is exactly what they did. They did not have consent.

When considering the State's argument that the notarized, signed affidavit of Randy Novak was excluded because it was "classic hearsay", State's Brief at ¶ 42, it is hard to imagine that what Officer Stanger offered up at the suppression hearing about what Mr. Novak allegedly said was not. Novak was just as unavailable for the Defendant to cross examine as he was for the Plaintiff. However, it is abundantly clear that the lower court accepted Mr. Novak's alleged statements through Officer Stanger's testimony as the truth rather than consider Mr. Novak's affidavit or the Defendant's direct testimony. Apparently an affidavit signed under oath holds more

hearsay than alleged statements of another through a third person. The lower court clearly erred.

Conclusion

For the above reasons as well as the reasons put forth in the Defendant's main brief, this case should be reversed.

Dated this 22 day of May, 2006.

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