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STATE OF NORTH DAKOTA

SUPREME COURT OF THE STATE OF NORTH DAKOTA

State of North Dakota,)
)
 Plaintiff and)
 Appellee,)
) Sup. Ct. No.: 20060164
 vs.)
) Cass Co. No.: 09-05-K-3417
 Natalee Duchene,)
)
 Defendant and)
 Appellant.)
 _____)

APPELLANT'S BRIEF

APPEAL FROM THE CRIMINAL JUDGMENT ENTERED ON MAY 23, 2006

CASE NO.: 09-05-K-3417
COUNTY OF CASS
EAST CENTRAL JUDICIAL DISTRICT
HONORABLE STEVEN E. McCULLOUGH

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STATEMENT OF THE ISSUES

- I. Whether the trial court erred in denying Defendant's motion to suppress all evidence gathered through the execution of the search warrant on her home because the search warrant was not supported by probable cause.

STATEMENT OF THE CASE

This is an appeal from a judgment and commitment upon a conditional guilty plea finding the Defendant, Natalee Duchene, guilty of Possession of Drug Paraphernalia in violation of section 19-03.4-03, N.D.C.C., a class C felony, and Possession of Drug Paraphernalia in violation of section 19-03.4-03, N.D.C.C., a class A misdemeanor. Defendant was charged with by criminal information dated September 9, 2005. (Docket #1; Appendix [App.] at 4-5). At the initial appearance Defendant indicated the correct spelling of her first name was N-A-T-A-L-E-E and the state moved to amend the information to correct the spelling. (Transcript of Proceeding "INITIAL APPEARANCE", dated September 9, 2005, at 6). The court granted the motion. (Id.). Although the spelling was corrected in pen on the Information at that time, (App. at 4), documents later filed with the court continued to contain the incorrect spelling.

Defendant moved to suppress evidence obtained in the

execution of a search warrant on the home of Defendant. (App. at 6). A hearing was held on the motion. (Transcript of Hearing: "Motion To Suppress", dated January 25, 2006). The motion was denied. (App. at 13-18). Defendant petitioned the court to enter a conditional guilty plea under rule 11(a)(2) of the North Dakota Rules of Criminal Procedure, reserving her right to appeal the denial of the motion to suppress. (App. at 19-21). The court accepted her conditional plea in open court. (Transcript of Proceeding: "CHANGE OF PLEA HEARING", dated May 8, 2006). Judgment was entered on May 23, 2006. (Docket 33; App. at 22-28). "NOTICE OF APPEAL" was filed June 1, 2006. (Docket 35; App. at 29).

STATEMENT OF FACTS

On or about September 8, 2005, the Fargo Police Department executed a search warrant on Defendant's home. (Transcript of Hearing: "Motion To Suppress", at 5; App. at 7-12). The warrant was issued by Judge Steven L. Marquart, East Central Judicial District. (App. at 7). The warrant was based solely on the Affidavit of Detective Glen Hanson of the Fargo Police Department. (App. at 7). The warrant and affidavit were marked as Exhibit 1 and received by the court at the hearing on the motion. (Transcript of Hearing: "Motion To Suppress", at 5-6). The warrant and Exhibit are reproduced

in full at pages 7 through 12 of the Appellant's Appendix.

According to "EXHIBIT A" attached to the affidavit requesting the search warrant, the police were in pursuit of evidence related to marijuana usage and or delivery, including money, lists, etc., pagers, and persons connected to illegal activity related to marijuana. (App. at 8). The affidavit for the warrant included "EXHIBIT B", which contains the evidence proffered by the affiant to support a finding of probable cause to support a search warrant. (App. at 10-12).

For her Statement of Facts, Defendant here quotes "EXHIBIT B" in full:

Your affiant Glen N. Hanson, is a Detective with the Fargo Police Department Narcotics Unit, and has been employed as a police officer with the Fargo Police Department since 1989. Your affiant's education includes receiving a Bachelor's Degree from Moorhead State University with a degree in Education. Your Affiant has completed the North Dakota Law Enforcement Basic Course as well as the Fargo Police Department 12 week Field Training Program. Your Affiant has over 1200 hours of post-certified law enforcement training and over 15 years experience in Law Enforcement. Your Affiant attended Drug Interdiction Through Traffic

Enforcement, 72 hours, and several other narcotics related courses in the investigation of controlled substance investigations. Your Affiant has been a Field Training Officer tasked with training in new police officers since 1993 and assisted in the training of over 15 new police officers before being transferred into the Fargo Police Narcotics Unit in March of 2000. Your Affiant's duties include the investigation of the violation of federal and state[] controlled substance law. During June 18th through June 28th, 2001, your Affiant attended an 80-hour DEA (Drug Enforcement Administration) course referred to as "The Two Week Basic Narcotics and Dangerous Drugs", course #3-01. During February 3rd through February 7th, 2003, your Affiant attended a 40-hour "Clandestine Laboratory Safety Certification" course in Sacramento[,] California, a course designed and instructed by members of the DOJ (Department of Justice). The Clandestine Laboratory Safety Certification is an OSHA (Occupational Safety and Health Administration) approved and required course

included training in common chemicals used in clandestine laboratories, protection from these chemicals and other hazardous waste materials exposure for law enforcement officers that respond to illegal clandestine laboratories. In October of 2003 and in September of 2004, your Affiant was recertified during an 8 hour Clandestine Laboratory refresher course put and certified by the DEA. Your Affiant has applied for over 270 search warrants, predominantly narcotics search warrants, resulting in numerous felony arrests, since being transferred into the Fargo Police Narcotics Unit. Your Affiant has assisted in the preparation and/or execution of additional search warrants written and executed by area law enforcement officers with the majority of those being narcotics related. Your Affiant is familiar with common practices used by persons who use, manufacture and distribute controlled substances.

On September 7, 2005, your Affiant received information from a confidential informant. Your Affiant note[s] that this is the first time information received from this confidential informant has been used to apply for a search

warrant. Further your Affiant notes this CI is working off drug charges from an arrest in Fargo in the past month. Your Affiant notes that the CI has not been proved to be reliable yet. Your Affiant notes speaking with the CI in the past and informing the CI that in order to receive consideration for the charges they have against them, it is important to take some time to think about how important it is to be truthful with law enforcement. Further the CI was informed to report drug activity to your Affiant if they should so choose to help out law enforcement. Your Affiant notes that the CI took some time and spoke with their family members and decided to help themselves as well as help law enforcement by giving up information about those persons they are aware of that use and deal in illegal drugs in consideration for the charges pressed against the CI.

Your Affiant notes that on September 7, 2005, the CI informed your Affiant that Natalee Duchene is living at 2526 15th St S, Apartment #17. The CI further went on to say they observed a blue marijuana bong, approximately 1 foot high, in the bedroom that Duchene uses. Further the CI stated

that the observation was made in the last 24 hours. Your Affiant notes that the CI knows what a marijuana bong is from past use and observations of others using a water bong to smoke marijuana. The CI further stated that Duchene is a dealer of methamphetamine and marijuana and knows this from conversations and being at Duchene's residence in the past and observing this behavior.

On September 7, 2005, your Affiant checked with the Fargo Police records and found that Natalee Michelle Duchene, 8/6/1983 is listed as living at the address of 2526 15th St S, Apartment #17.

On September 7, 2005, your Affiant had Inv. Dane Hjelden check with Excel energy for subscriber information for power at the address of 2526 15th St S, Apartment #17 and the listed subscriber is Natalee Duchene, no other persons were listed on the subscriber information.

Based on your Affiant's training and experience the item observed and described by the CI sitting on a night stand in the bedroom of Natalee Duchene is illegal drug paraphernalia, a marijuana water bong. Your Affiant has seen

numerous marijuana water bong, over 50, and the described item by the CI fits the description of a marijuana water bong used for smoking marijuana. The CI described this marijuana water bong as blue and approximately 1 foot high. Further your Affiant notes that drug paraphernalia can be expensive and is not readily disposed of. Your Affiant notes that drug paraphernalia can come in many different sizes and different materials to include home made drug paraphernalia. Your Affiant has seen persons who use illegal drugs, keep and re-use drug paraphernalia for future use. Your Affiant has seen people who have kept drug paraphernalia for future use, several times during executions of search warrants and arrests of those people who use drugs.

Your Affiant is aware that individuals involved in the possession of controlled substances often conceal on their persons controlled substances, monies, and paraphernalia in an attempt to prevent law enforcement officers from locating and seizing these items. To avoid the loss of potential evidence, your Affiant therefore request[s] permission to search the person of all

individuals located at, or who immediately flee from 2526 15 St S, Apartment #17, Fargo, ND[] as the time of the execution of this search warrant.

From the above information provided by your Affiant's investigation and corroboration, it appears that (suspect) is engaged in criminal acts at 2516 15 St S, Apartment #17 Fargo, ND, specifically the possession, sales and use of marijuana and methamphetamine. From your Affiant's experience and training, your Affiant has reason to believe that there is now concealed at 2516 15 St S, Apartment #17, Fargo, ND[,] items of contraband listed in Exhibit A that is evidence of these crimes. Your Affiant asks the court to order law enforcement officers to search 2526 15 St S, Apartment #17, Fargo, ND for these items.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

In the Detective's handwriting below the magistrate's signature on "EXHIBIT B", the following language was added:

The CI has given additional information about 2 drug dealers in the Fargo area that your Affiant has had prior information on. Your Affiant states those individuals have been and are being investigated presently by the Fargo Police

Narcotics Unit. The information provided by the CI has been checked on and found to be true - as far as information on names, addresses and the fact FPD officers have investigated those names.

(App. at #).

ARGUMENT

Issue: Whether the trial court erred in denying Defendant's motion to suppress all evidence gathered through the execution of the search warrant on her home because the search warrant was not supported by probable cause.

On appeal, this court reviews the sufficiency of the information before the magistrate "independent of the trial court's decision and use[s] the totality-of-the-circumstances test." *State v. Roth*, 2004 ND 23, ¶ 5, 674 N.W.2d 495.

"Although each bit of information . . ., by itself, may not be enough to establish probable cause and some of the information may have an innocent explanation, 'probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers . . . which is not weighed in individual layers but in the 'laminated' total."

Id. (citing *State v. Damron*, 1998 ND 71, ¶ 7, 575 N.W.2d 912). Whether there is probable cause to search is a question of law fully reviewable on appeal. *Id.*

Article 1, section 8, of the North Dakota Constitution and the Fourth Amendment to the United States Constitution protect individuals from unreasonable searches and seizures in their homes. *State v. DeCoteau*, 1999 ND 77, ¶ 7, 592 N.W.2d 579, 582. Such searches are unreasonable unless they come within "a few well-defined exceptions[.]" *Id.* "[P]hysical entry into a home is the chief evil against which the Fourth Amendment is directed[.]" *Id.*, ¶ 8.

A search warrant, other than one supported by oral testimony, may be issued "only on an affidavit or affidavits sworn to or sworn recorded testimony taken before a" magistrate. N.D.R.Crim.P 41(c)(1). This court summarized the standards for issuing search warrants in *State v. Guthmiller*, 2002 ND 116, ¶¶ 10-11, 646 N.W.2d 724:

"Probable cause is required for a search warrant under the Fourth Amendment to the United States Constitution and Article I, Section 8 of our state constitution." *State v. Thieling*, 2000 ND 106, ¶ 7, 611 N.W.2d 861. "Probable cause to search exists 'if the facts and circumstances relied on by the magistrate would warrant a person

of reasonable caution to believe the contraband or evidence sought probably will be found in the place to be searched.'" *Id.* (quoting *State v. Johnson*, 531 N.W.2d 275, 278 (N.D. 1995)). Probable cause to search does not require the same standard of proof necessary to establish guilt at trial; rather, probable cause to search exists if it is established that certain identifiable objects are probably connected with criminal activity and are probably to be found at the present time at an identifiable place. *State v. Ringquist*, 433 N.W.2d 207, 212 (N.D. 1988). "Although each piece of information may not alone be sufficient to establish probable cause and some of the information may have an innocent explanation, 'probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers.'" *Thieling*, at ¶ 7 (quoting *State v. Damron*, 1998 ND 71, ¶ 7, 575 N.W.2d 912 (citations omitted)). "The task of the issuing magistrate is to make a practical, commonsense decision whether, given all the information considered together, there is a fair probability

contraband or evidence of a crime will be found in a particular place." *State v. Rydberg*, 519 N.W.2d 306, 308 (N.D. 1994).

The trial court reviewing the validity of a search warrant decides whether the information before the magistrate established probable cause to search. *Id.* "Whether probable cause exists to issue a search warrant is a question of law." *Thieling*, 2000 ND 106, ¶ 8, 611 N.W.2d 861.

"The problem of determining the existence of probable cause to issue a search warrant is increased when the affiant has obtained [the] information through an informant." *State v. Schmeets*, 278 N.W.2d 401, 406 (N.D. 1979). "The magistrate must be informed of enough underlying circumstances to enable him to determine that the informant's observations regarding the commission of a crime were accurate . . . and that the informant was credible or his information was reliable" *Id.* "The magistrate should not accept the mere conclusion of the person who makes application for a warrant, to the effect that grounds for issuance of a warrant exist." *State v. Dove*, 182 N.W.2d 297, 301 (N.D. 1970).

This court has identified three types of informants with varying degrees of reliability. *State v. Roth*, 2004 ND 23, ¶ 9, 674 N.W.2d 495. A "citizen informant" is one who

volunteers information and does not want anything in return and who has no fear of going to jail. *Id.* at ¶ 10. “‘Citizen informants are presumed reliable “and their reliability should be evaluated from the nature of their report, their opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation.’” *Id.* (citing *State v. Frohlich*, 506 N.W.2d 729, 733 (N.D. 1993)).

A “confidential informant” is one who is known to the officer, but whose identity is concealed from the magistrate. *Id.* at ¶ 11. A confidential informant is not presumed reliable but is still considered more reliable than an anonymous informant. *Id.*

An “anonymous informant” is unknown to the officer and the magistrate. *Id.* at ¶ 12. Anonymous informants “‘must supply information from which one may conclude that the informant is honest and his information is reliable, or from which the informant’s basis of knowledge can be assessed.’” *Id.* (citing *State v. Hage*, 1997 ND 175, ¶ 17, 568 N.W.2d 741).

Detailed information of misconduct, e.g., describing method or minute details of activity, may have the required specificity to support a finding of probable cause. *E.g.*, *State v. Roth* 2004 ND 23, ¶ 14, 674 N.W.2d at 501. Such information combined with an officer’s testimony that the

informant supplied reliable information leading to convictions in the past may show probable cause. *Id.* at ¶ 15. However, the information must be more than just "bare bones" indicia of criminal activity. *Id.* at ¶ 17. Further, "[s]tale information of previous misconduct" is not sufficient to establish probable cause that similar conduct or other improper conduct is continuing to occur. *Id.* Also, "[W]here there is merely information which may cause suspicion and warrant further information, there is not probable cause to search. *State v. Thieling*, 2000 ND 106, ¶ 8, 611 N.W.2d 861, 863.

The search warrant issued for the home of Defendant, Natalie Duchene, was based solely on the affidavit of Detective Glen N. Hansen, of the Fargo Police Department. The material information supplied in the affidavit is in the "EXHIBIT B", attached to the warrant. (App. at 10-12). Any information in that exhibit which would in any way hint at criminal activity is information provided to Detective Hansen by a confidential informant. According to Detective Hansen, this was the first time information from this confidential information was used to apply for a search warrant. Detective Hansen specifically stated that the "CI has not been proved to be reliable yet." (Emphasis added). According to the exhibit, the CI provided the information under the pressure of

family and police, as consideration for charges related to his/her own criminal activity. In the handwritten addenda to "EXHIBIT B", it is indicated that the CI has provided other information on individuals who "have been and are being investigate[d] presently by the Fargo Police Narcotics Unit." The addenda concludes that information provided as to names and addresses and the fact of investigation have proved true. There is no indication that any convictions, or even charges, resulted from information provided by this confidential informant.

The confidential informant reported that there was a bong, apparently on a bedstand, in the bedroom used by Ms. Duchene. However, the informant provided no details about the layout of the apartment, the furniture in the bedroom, or any other information that would provide adequate specificity to show reliability in the statements. Everyone has a bedroom and most everyone has a bedstand, or something that could be described as a bedstand, for the placement of personal items. Anyone could say that so-and-so has a bong in their bedroom. Without greater detail, the information is not reliable and its credibility cannot be measured.

The affidavit does not inform of enough "underlying circumstances to enable [a magistrate] to determine that the informant's observations regarding the commission of a crime

were accurate." *Accord State v. Schmeets*, 278 N.W.2d at 406. At best the bare bones information attributed to the confidential informant is "merely information which may cause suspicion and warrant further information", and not sufficient to establish probable cause to issue a search warrant. *Compare State v. Thieling*, 2001 ND 106, ¶ 8, 611 N.W.2d at 863.

In conclusion, the facts and circumstances relied upon by the magistrate were not sufficient to "warrant a person of reasonable caution to believe the contraband or evidence sought probably [would] be found in the place to be searched." *E.g., Guthmiller*, 2002 ND 116, ¶ 10, 646 N.W.2d at 861. The trial court should have ordered the suppression of all evidence gained through the search warrant.

CONCLUSION

In conclusion, the judgment of the trial court should be reversed. The court should order the suppression of the evidence and remand to allow Defendant to withdraw her guilty pleas. Defendant then could be afforded the opportunity for trial should the state decide to proceed on the remaining evidence.

Respectfully submitted this 19 day of July, 2006.

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