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IN THE SUPREME COURT

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MAR 9 2007

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

Supreme Court No. 20060334

State of North Dakota,)
)
Plaintiff and Appellee,)
vs.)
)
Ronald Gene Albaugh,)
)
Defendant and Appellant.)

APPEAL PURSUANT TO A CONDITIONAL GUILTY PLEA FROM DENIAL OF PLAINTIFF'S MOTION TO SUPPRESS EVIDENCE
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE DOUGLAS R. HERMAN, PRESIDING

APPELLEE'S BRIEF

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[¶3]On September 17, 2005, West Fargo Police Officer Ken Zeeb was dispatched to 710 Center Street in West Fargo. Transcript of Hearing on Motion to Suppress of July 19, 2007 (Tr.) at 7, line 1-2. The property owner at that location had evicted the tenants and requested police assistance in checking the property to see if it had been vacated. Tr. at 7, line 4-8. The property consisted of an automotive shop and a loft area with a couch, coffee table, and a television. Tr. at 9, line 25 and Tr. at 10, lines 1-2 and 14-8. It was not residential property. See Appellant's Appendix (App.) at 27 (lease describing property as "office and shop space'). The property owner indicated to Officer Zeeb there may be someone still living there and he wanted a police escort in case a problem arose. Tr. at 8, line 17-22. Officer Zeeb and the property owner proceeded to the premises. Tr. at 8, line 24-5; Tr. at 9,lines 1-2. The property owner entered the premises and Officer Zeeb stood in the doorway. Tr. at 8, line 24-5; Tr. at 9, lines 1-2. Officer Zeeb heard the property owner conversing with someone and stepped inside so he could see what was happening. Tr. at 9, lines 8-9.

[¶4]Officer Zeeb saw the property owner conversing with the Defendant. Tr. at 9, line 18. Officer Zeeb observed the property had obviously not been vacated. Tr. at 9, lines 21-2. Officer Zeeb asked the Defendant for identification. Tr. at 9, line 23. The Defendant indicated he thought his identification would be in the loft area. Tr. at 10, lines 9-10. As the Defendant began walking upstairs, Officer Zeeb asked if he could accompany the Defendant. Tr. at 10, lines 9-12. The Defendant said "okay." Tr. at 10, line 11.

[¶5]The Defendant retrieved his identification from a wallet on the coffee table. Tr. at 10, lines 15-19. While in the loft area with the Defendant, Officer Zeeb noticed a one-

hitter marijuana pipe and a bag containing methamphetamine on the coffee table. Tr. at 10, 20-25. Officer Zeeb then placed the Defendant under arrest for possession of drug paraphernalia and possession of methamphetamine. Tr. at 11, lines 4-6. Officer Zeeb searched the area immediately around the Defendant and found a shaving kit containing additional items of drug paraphernalia. Tr. at 11, lines 8-9 and 17-18.

[¶6]Officer Zeeb knew from a previous conversation with narcotics officers that there may be drug activity going on at the shop. Tr. at 26, lines 9-14. Detective Brad Berg of the West Fargo Police Department went out to the location to talk to the Defendant. Tr. at 12, lines 2-3. Detective Berg obtained both oral and written consent to search the property from the Defendant. Tr. at 35, lines 11-21. Officers searched vehicles located in the shop and found additional drug paraphernalia. Tr. at 44, lines 4-5.

[¶7]The State charged the Defendant with possession of methamphetamine (a class C felony), possession of methamphetamine paraphernalia (a class C felony), and possession of marijuana paraphernalia (a class A misdemeanor). App. at 4-5. The Defendant filed a motion to suppress evidence claiming the evidence was obtained from an unlawful search of the residence and vehicles. App. at 6. The trial court denied the Defendant's motion to suppress finding:

[¶8]1. The entry of Officer Zeeb into the premises was a legitimate activity, not protected by the Fourth Amendment.

[¶9]2. The subsequent seizure of items found on the coffee table was pursuant to the plain view exception after the Defendant consented to have the officer follow him upstairs.

[¶10]3. The items in Defendant's immediate area were found subsequent to a search incident to a valid arrest.

[¶11]4. After the Defendant's arrest, the rest of the premises was found pursuant to a signed written consent, and is therefore valid.

[¶12]App. at 12-3. The Defendant entered a conditional plea of guilty. App. at 14-8. The Defendant appeals claiming "Officer Zeeb's entry and conduct after entry into Mr. Albaugh's stop/residence violated Mr. Albaugh's right to be free from an unconstitutional search and seizure, and the evidence obtained thereby must be suppressed." Defendant's Brief at 9.

[¶13]**Standard of Review**

[¶14]"In reviewing a district court's decision on a motion to suppress evidence, [this Court] defer[s] to the district court's findings of fact and resolve[s] conflicts in testimony in favor of affirmance." State v. Graf, 2006 ND 196, ¶ 7, 721 N.W.2d 381; State v. Goebel, 2007 ND 4, ¶ 11, 725 N.W.2d 578. This Court "will affirm a district court's decision on a motion to suppress if '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.'" Graf at ¶ 7 (quoting City of Fargo v. Thompson, 520 N.W.2d 578, 581 (N.D. 1994)). This Court "recognizes the importance of the district court's opportunity to observe the witnesses and assess their credibility." Graf at ¶ 7; Goebel at ¶ 11.

[¶15]I. The trial court correctly concluded Officer Zeeb's entry into the premises was a valid community caretaking function and, thus, was not a "search" for purposes of the Fourth Amendment.

[¶16]"The Fourth Amendment to the United States Constitution and article 1, § 8, of the North Dakota Constitution protect individuals from unreasonable searches and seizures." Graf at ¶ 9; see also, State v. Mitzel, 2004 ND 157, ¶11, 685 N.W.2d 120. "The United States Supreme Court has defined a Fourth Amendment search as an intrusion into a person's reasonable expectation of privacy." State v. Proell, 2007 ND 17, ¶ 8, 726

N.W.2d 591. "'When an individual reasonably expects privacy in an area, the government . . . must obtain a search warrant unless the intrusion falls within a recognized exception to the warrant requirement.'" Proell at ¶ 8 (quoting State v. Gregg, 2000 ND 154, ¶ 23, 615 N.W.2d 515).

[¶17]This Court has recognized "several permissible types of law enforcement-citizen encounters, including: '(1) arrests, which must be supported by probable cause; (2) '*Terry*' stops, seizures which must be supported by a reasonable and articulable suspicion of criminal activity; and (3) community caretaking encounters, which do not constitute Fourth Amendment seizures.'" State v. Boyd, 2002 ND 203, ¶ 6, 654 N.W.2d 392 (quoting State v. Halfmann, 518 N.W.2d, 729, 730 (N.D. 1994)). "Not all citizen-law enforcement encounters implicate a citizen's Fourth Amendment rights; a seizure occurs only when a law enforcement officer, by means of physical force or show of authority, in some manner restrains the liberty of a citizen." Rist v. North Dakota Dept. of Transp., 2003 ND 113, ¶ 8, 665 N.W.2d 45. The trial court, in the present case found "Officer Zeeb was legitimately attempting a community care taking function as requested by the landlord when he entered the premises." App. at 11. Because Officer Zeeb's conduct constituted a community caretaking function, Officer Zeeb's actions did not, the trial court concluded, give rise to a Fourth Amendment concern. App. at 12.

[¶18]"Law enforcement officers often serve as community caretakers." Boyd at ¶ 7. State v. Keilen, 2002 ND 133, ¶ 14, 649 N.W.2d 224. "The United States Supreme Court described community caretaking functions as those 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" Boyd at ¶ 7 (quoting Cady v. Dombrowski, 413 U.S. 433, 441 (1973)). "Community caretaking

allows law enforcement -citizen contact, including stops, without an officer's reasonable suspicion of criminal conduct." Boyd at ¶ 7; Rist at ¶ 9.

[¶19]In State v. Keilen, this Court recognized it has not specifically applied the community caretaking doctrine to cases other than those involving the stop of a motor vehicle. Keilen at ¶ 17 (recognizing this Court has not discussed the community caretaking function outside the realm of vehicles). Subsequent cases involving the community caretaking doctrine have all involved vehicle stops. See Boyd (applying the community caretaking doctrine to vehicle stops); Rist (applying the community caretaking doctrine to officers approaching a vehicle in which the driver was slumped over at the wheel); and State v. Leher, 2002 ND 171, 653 N.W.2d 56 (applying the community caretaking doctrine to officers approaching a parked vehicle). The State would urge the Court to affirm the trial court's application of the community caretaking doctrine to the facts of this case.

[¶20]"The United States Supreme Court first adopted the community caretaker doctrine in *Cady v. Dombrowski*," 413 U.S. 433 (1973). Commonwealth v. Waters, 456 S.E.2d 527 (Va. App. 1995). Admittedly, many police-citizen contacts occur "because the officer may believe the operator has violated a criminal statute, but many more [are] not [ ] of that nature." Cady at 441. "Local police officers . . . [frequently] engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Cady at 441. "While many cases interpreting the community caretaker function involve application of the exception to police contact with motor vehicles, no language in . . . *Cady* restricts an officer's community caretaking actions to incidents involving automobiles. Waters at 529-30. The duty of police officers "extends beyond the

detection and prevention of crime, to embrace also an obligation to maintain order and to render needed assistance." Waters at 30.

[¶21]The United States Supreme Court has applied the community caretaking doctrine to inventory searches of a vehicle. Colorado v. Bertine, 476 U.S. 367 (1987). "[I]t is the [community] caretaking function which legitimizes an inventory [search]." State v. Kunkel, 455 N.W.2d 208, 211 (N.D. 1990). "Though the 'community caretaker' doctrine has traditionally been applied largely to traffic stops, it is not limited to them." Commonwealth v. Poole, 2006 WL 3613597, 2. One court explained "[i]t would be illogical to allow the police to render assistance to a convulsing man in a car while denying this same assistance to a man on the street." Waters at 530.

[¶22]In this case, Officer Zeeb was called to assist the property owner solely to provide protection for the property owner in case any problems arose with anyone who happened to be on the premises at the time. Tr. at 9, lines 9-11. Officer Zeeb stood in the doorway while the property owner walked inside. Tr. at 9, lines 1-2. Not until Officer Zeeb heard someone talking with the property owner did he enter the premises. Tr. at 9, lines 8-9. Officer Zeeb did not have his weapon drawn. Officer Zeeb approached the Defendant in a conversational manner asking the Defendant "if he had any identification that he could show [the officer]." Tr. at 22, lines 15-16. The State asserts, based on the facts presented at the motion hearing, there was sufficient competent evidence fairly capable of supporting the trial court's findings that Officer Zeeb's conduct fell within the "community caretaking function", and thus the decision is not contrary to the manifest weight of the evidence. See Graf at ¶ 7 (discussing standard of review).

[¶23]Notwithstanding the trial court's application of the "community caretaking" function to this case, the State also believes the trial court could have found Officer Zeeb's conduct constitutionally sound arguing his conduct did not amount to "state action" under the Fourth Amendment.

[¶24]Unless there is action on the part of the state, there can be no Fourth Amendment violation. See, e.g., Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (stating the Fourth Amendment's protection against unlawful searches and seizures "applies to governmental action," and it "was not intended to be a limitation upon other than governmental agencies"). The Fourth Amendment does not apply to a search and seizure conducted by a private individual who is not acting as an agent of the government. U.S. v. Jacobsen, 466 U.S. 109, 113 (1984). When a police officer is performing a "community caretaking" function, the officer is not acting as a government agent. See, e.g., Coleman, 628 F.2d at 965 (finding the Fourth Amendment inapplicable because the "police actions constituted 'community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute'" (quoting Cady v. Dombrowski, 413 U.S. 433, 441 (1973)).

[¶25]Other courts have found no "state action" in "cases involving police 'stand by' type services." State v. Collins, 790 A.2d 660 (Md. Ct. App. 2002); see U.S. v. Dahlstrom, 180 F.3d 677 (5th Cir. 1999) (finding no "state action" where Sheriff's Officers were present to "keep the peace" while private parties retrieved documents.), cert. denied, 529 U.S. 1036 (2000); U.S. v. Coleman, 628 F.2d 961 (6th Cir 1980) (finding police presence to "stand by in case of trouble" insufficient to establish "state action" in repossession of a pickup). The State is also aware that in Cass County, law enforcement often provides a

"service to stand by" in domestic violence cases where the court orders a no contact order and law enforcement accompanies one party to the residence to retrieve their clothing and personal effects. In these type of "stand by" situations as in the present case, there is no "state action" to trigger a Fourth Amendment concern. Officers are merely present to keep the peace and prevent a dangerous situation from arising. Therefore, the State believes the officer's assistance to "stand by" would not amount to a "search or seizure" for purposes of the Fourth Amendment.

[¶26]II. Officer Zeeb's request for the Defendant's identification did not constitute a "seizure" within the meaning of the Fourth Amendment.

[¶27]The Defendant argues "[e]ven if Officer Zeeb had entered the [premises] to perform a 'community caretaking function,' . . . his action in ordering [the Defendant] to provide him identification were the actions of an officer who had removed himself from the scope of acceptable actions for officers acting a community caretakers, and were the actions of an officer who was now investigating potential criminal conduct." Defendant's Brief at 16. The State maintains Officer Zeeb's request for the Defendant's identification did not amount to a "seizure" within the meaning of the Fourth Amendment.

[¶28]The United States Supreme Court has "held repeatedly that mere police questioning does not constitute a seizure." Florida v. Bostick, 501 U.S. 429, 433 (1991). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, . . . ask to examine the individual's identification, . . . and request consent to search . . . as long as the police do not convey a message that compliance with their requests is required." Bostick at 435 (citations omitted). As the 8th Circuit recently explained "[l]aw enforcement officers do not violate the Fourth

Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." U.S. v. Vera, 457 F.3d 831, 834 (8th Cir. 2006). "A request to see identification is not a seizure, 'as long as the police do not convey a message that compliance with their request[ ] is required'." Vera at 835 (quoting Bostick at 435). "There is no per se requirement that an officer inform a citizen of his right to refuse consent, and there is no presumption that consent is invalid where given without an explicit notification of the right to refuse." Vera at 835.

[¶29]In this case, Officer Zeeb asked the Defendant "if he had any identification on him." Tr. at 9, line 23. The Defendant said it was "in his car, which was parked inside the shop." Tr. at 9, line 25; and 10, line 1. Officer Zeeb then asked "if he could see [the Defendant's] ID." Tr. at 10, line 2. The Defendant ultimately found it in the loft area and gave it to Officer Zeeb. Tr. at 11, lines 2-3. Officer Zeeb did not demand compliance with his request. Officer Zeeb did not tell the Defendant he was required to comply with the request for identification. Under the facts of this case, the State believes Officer Zeeb's request for the identification from the Defendant did not constitute a "seizure" for Fourth Amendment purposes.

[¶30]III. The Defendant consented to Officer Zeeb following him up to the loft where Officer Zeeb observed drugs and drug paraphernalia in plain view.

[¶31]Officer Zeeb lawfully entered the premises to provide assistance to the property owner. Officer Zeeb then obtained the Defendant's identification. The trial court found it "undisputed" the Defendant consented to Officer Zeeb accompanying the Defendant to the loft area to retrieve his identification. App. at 12. Once in the loft area, Officer Zeeb

observed drugs and drug paraphernalia in plain view. Tr. at 10, lines 20-25.

[¶32]"Under the plain view doctrine, if police officers are lawfully in a position from which they view an object, whose incriminating character is immediately apparent, and the officers have a lawful right of access to the object, they may seize it without a warrant." State v. Wamre, 1999 ND 164, ¶ 16, 599 N.W.2d 268 (citing Minnesota v. Dickerson, 508 U.S. 366 (1993)). "'[I]f contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus, no 'search.'" Wamre at ¶ 16 (quoting Dickerson).

[¶33]In this case, the Defendant consented to Officer Zeeb accompanying him up to the loft area. Tr. at 10, lines 9-12. The Defendant took a wallet off of the coffee table and looked through it for his identification. Tr. at 10, lines 16-18. Officer Zeeb testified "I was looking at the coffee table and I noticed a one-hitter pipe, that is commonly used to smoke marijuana, laying on the coffe table." Tr. at 10, lines 20-22. Officer Zeeb "also saw a small baggie that contained a very small amount of what [he] believed to be ice, which is a form of methamphetamine." Tr. at 10, lines 23-25. Officer Zeeb testified he has a bachelor's degree in criminal justice, he attended the Peace Officer Training Academy in Devil's Lake, he had approximately 2300 hours of law enforcement training, and he had over 14 years experience as a law enforcement officer. Tr. at 5, lines 16-24.

[¶34]Given Officer Zeeb's training and experience, it is reasonable to conclude the illegal nature of these items were immediately apparent to Officer Zeeb. Therefore, the State asserts the "plain view" exception to the warrant requirement would apply.

[¶35]IV. The subsequent search of the premises and vehicles was a valid search pursuant to written consent of the Defendant.

[¶36]Officer Zeeb's initial entry into the shop was a valid "community caretaking" function. The Defendant consented to Officer Zeeb accompanying him to the loft area. While there, Officer Zeeb observed drugs and drug paraphernalia in plain view. The Defendant then consented to a search of the premises and vehicles.

[¶37]"One of the exceptions to a warrantless search is consent." State v. Mitzel, 2004 ND 157 ¶ 13, 685 N.W.2d 120 (citing State v. DeCoteau, 1999 ND 77, ¶ 9, 592 N.W.2d 579). "The existence of consent is a question of fact to be determined from the totality of the circumstances." Mitzel at ¶ 13.

[¶38]In this case, the Detective Brad Berg of the West Fargo Police Department talked to the Defendant after he had been placed under arrest. Tr. at 33, lines 22-23; Tr. at 34, lines 20-21. Detective Berg obtained oral consent and written consent to search the premises. Tr. at 35, lines 11-15. Detective Berg gave the Defendant an opportunity to read the consent form, asked the Defendant if he had any questions about it, and explained to the Defendant signing the consent form was completely voluntary. Tr. at 35, lines 11-20. Detective Berg testified the Defendant was "pleasant and cooperative" with him. Tr. at 35, lines 9-10. The Defendant ultimately signed the consent form. Tr. at 35, line 21. Officers found additional items of drug paraphernalia. Tr. at 35, lines 21-22. The State asserts the Defendant's consent to search was voluntary and the subsequent search based on the Defendant's consent was constitutional.

[¶39]**Conclusion**

[¶40]Officer Zeeb lawfully entered the premises to assist the property owner. The initial entry was a valid community caretaking function, thus, not a "search" for purposes of Fourth Amendment analysis. The Defendant voluntarily produced his identification. Officer Zeeb observed drugs and drug paraphernalia in plain view in the loft area. The subsequent search of the premises was a valid search pursuant to written and oral consent of the Defendant. Therefore, the State respectfully requests the Court affirm the decision of the trial court.

Respectfully submitted this 9th day of March, 2007.

Tracy J. Peters
Assistant Cass County State's Attorney
ND Bar ID #05432

[¶41]**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was sent by e-mail on this 9th day of March, 2007, to kirschnerlaw@cableone.net, the email address for:

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