ORIGINAL (e-filed)

20060334

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	:	
Plaintiff and Appellee	:	
-v-	:	Supreme Court No.20060334
Ronald Gene Albaugh,	:	District Court No. 05-K-03570
Defendant and Appellant	:	

APPELLANT'S REPLY BRIEF

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

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FACTS

[1] In the Statement of Facts contained in the Brief submitted by the State, the claim is made that "the property owner at that location had evicted the tenants..." This statement is not a correct statement of the facts in this case, and no testimony was supplied at the hearing which supports that statement. As a matter of fact, the testimony provided by West Fargo Police Officer Ken Zeeb was that Mr. Diede told him that "he had served an eviction on his property there." (Page 7, lines 18-22). In addition, the Officer testified that he did not know whether an actual Judgment for eviction had been obtained. (Tr. P. 8, lines 11-14).

ARGUMENT

1. Officer Zeebs entry and activities in the Shop/residence are not justified by the Community Caretaking Exception to the Fourth Amendment.

[2] The Plaintiff it its brief, cites no example where this Court or any other has found that the police were involved in a community caretaking function, when they acted to enforce the law by entry into someone's home. The Plaintiff's brief ignores the fact that no matter what the officer may have believed, he had no legal right to enter the premises. **Minnesota v. Olson**, 495 U.S. 91, 98-99 (1990).

[3] Unlike a police citizen encounter on the street or the highways, this case involved a policeman entering into the residence of a person, without either the invitation or authorization of the person who had a right to privacy in that property. While the State might wish that the facts were different in this case, it is clear that the police officer was not asked to enter by the landlord, nor was he invited to enter by the defendant. The District Court heard no evidence and did not find, that the landlord asked the police officer to enter the premises. In addition, the entry was done to enforce a non-existent eviction, and to remove the person who was there. Since the Officer never bothered to establish who had the legal right to be in the premises, he had no authority to order anyone to leave the premises. The landlord could only seek the removal through a lawful eviction process, and since that had not been done, neither tenant or his guest could be removed from the premises. Removal without the benefit of Court process, would have violated this

defendant's right to due process, and would also have been unconstitutional. **Fuentes v. Shevin**, 407 U.S. 67 (1972).

2. **Officer Zeeb's conduct in entering Mr. Albaugh's shop was not private, non-state activity.**

[4] The State argues for the first time, in it's appellate brief, that the actions of Officer Zeeb, undertaken, while he was on duty and when he had been dispatched by the West Fargo dispatch was not state action, and therefore did not violate the defendant's rights under the Fourth Amendment of the United States Constitution and Article 1 Section 8 of the North Dakota Constitution.

[5] Facially, the State's argument that a police officer, in uniform, dispatched while on duty to assist someone could hardly be said to be "private" rather than "state"action. The cases cited by the State to support this argument, show the distinction between when a private actor conducts a search or seizure and when the police do so as state actors.

[6] In none of the cases cited by the State did the police enter someone's home or private business area without a warrant, nor did the Court subsequently find that a police entry was not state action. The State cites the case of **State v. Collins**, 790 A.2d 660 (Md. Ct. App. 2002), in its brief for the proposition that "Other courts have found "no state action" in "cases involving police 'stand by' type services."

[7] However, **State v. Collins**, 790 A.2d 660 (Md. Ct. App. 2002) was not a

case where the Court found no state action, and was not a case where the police were merely involved in "stand by services." In **Collins**, the issue was whether the private bail bond agents were acting as agents of the State when they entered the defendant's apartment, with the assistance of a police officer, who knocked on the door of the residence and spoke to the persons to seek permission for the agents to enter the apartment. The Court determined that while bail bond agents do not have police powers to arrest, and are not generally state agents, under the facts in **Collins,** where they acted in substantial collusion with the police, their actions were found to be state actions. Thus, their actions in entering the home without the defendant's permission, and without a warrant, were subject to the protections of the Fourth Amendment, and their failure to abide by that amendment, justified the Court's decision to suppress the evidence obtained from a subsequent warrant based upon observations made by the bail bond agents during their prior entry.

[8] In **Collins**, the issue was when does a private party search become a state actor search. The Court mentioned two critical factors in determining whether the private person is an instrument or agent of the government. Those factors were (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends. at 669. If the situation here was one where, Mr. Diede had entered the premises and found evidence of a crime being committed by the

defendant and then provided that evidence to the State, then this test would apply. But in our case, it is the police officer, on duty, acting on behalf of the City of West Fargo, who is entering on the premises, without a warrant, and without an invitation. No evidence was presented to indicate that he was acting as a private party when he entered the defendant's home.

[9] The State cites **United States v. Coleman**, 628 F. 2d 961 (6th Cir. 1980) for the proposition that the presence of the police, who agreed to "stand by in case of trouble" was insufficient to establish "state action" in the repossession of a pickup. The defendant in this case is not arguing that Officer Zeeb "standing by, outside the building" constituted state action, or was a violation of the defendant's rights. It was Officer Zeeb's decision to enter into the building which constitutes the search that the defendant objects to.

[10] The facts of what occurred in **Coleman** are significantly different than what occurred in this case. In **Coleman**, it was the private citizen who was acting to repossess the truck pursuant to Michigan's "self-help" repossession statute who discovered the shotgun and who gave the gun to the officers. That was a private search, and the government was the recipient of the evidence discovered during it. In **Coleman** the private citizen was acting within his legal rights in repossessing the truck. In this case, the landlord, Mr. Diede had no right to force Mr. Albaugh to leave the premises, as Mr. Albaugh was the guest of the lessee, and the lease had

not been legally terminated. In addition, it was not Mr. Diede who did the searching and seizing in this case, but Officer Zeeb. The issue would be very different if Mr. Diede had entered the premises and done a search and then provided the evidence to the police.

[11] Similarly, the citation to **United States v. Dahlstrom**, 180 F.3d 677 (5th Cir. 1999) is inapposite. **Dahlstrom**, again involved a situation where the search was conducted by private parties, and the police were merely present to keep the peace. Again, if Officer Zeeb had merely waited outside to make sure that no violence broke out, or had entered the premises when he believed some sort of threat had occurred or was occurring, the situation might be different. But the evidence revealed that Officer Zeeb entered the building merely because he heard voices, and not because he was invited and not because he believed that Mr. Diede was in any danger. Once inside the premises, Officer Zeeb took control of the situation, and with his uniform and weapons, Mr. Albaugh, a small man, was hardly in the position to confront him, and acquiesced to his greater size and authority.

3.**Police entry into a home or private area to conduct questioning is a seizure**

[12] The State cites **Florida v. Bostick**, 501 U.S. 429 (1991) for the proposition that police officers do not need any particular basis to suspect an individual of criminal behavior, to ask that individual questions, or to ask for that person's consent to search. ***See also,*** **Florida v. Rodriguez,** 469 U.S. 1, 5 -6 (1984), nor to

ask to examine identification, **INS v. Delgado**, 466 U.S. 210, 216 (1984), nor to request consent to search luggage, **Florida v. Royer**, 460 U.S. 491, 501 (1983). The Court in **Bostick**, approved this questioning, provided that the police do not convey a message that compliance with their requests is required The key in all of these cases was that the encounters took place in a public place where the person's had chosen to go, and the person was not required to continue to interact with the police if he/she did not want to. None of these cases involved an officer entering into a person's residence without a warrant and ordering the person to provide identification. It was in compliance with this order that the original evidence in this case was discovered in "plain view."

[13] In **Bostick**, the U.S. Supreme Court struck down the Florida Supreme Court decision, which had held that every encounter on a bus was a per se seizure, and remanded the case for the Florida courts to decide whether, under the circumstances, "surrounding the encounter, a reasonable passenger would feel free to decline the officers' requests or otherwise terminate the encounter."

[14] The Defendant submits that speaking to a person on the street, or in a public place is very different than coming into a person's home and private space and demanding that they produce identification. Both this Court and the United States Supreme Court have noted the significant difference between encounters on the public way, and in vehicles and the entry by law enforcement into one's home.

[15] In arguing that Officer Zeebs demand that Mr. Albaugh produce identification did not constitute a seizure, the State relies on the recent Eighth Circuit case, **United States v. Vera**, 457 F.3d 831 (2006). In **Vera**, a police officer pulled his car next to that of a parked car in a rest area off of Interstate 80. After noticing the person in the driver's seat suddenly sit up and look at him, the officer walked over to the vehicle to "make sure everything was all right and just to talk to him." The Court found that the subsequent discussion between the officer and a passenger in the vehicle where the officer asked the passenger to step out of the vehicle and then to have a seat in his patrol car did not constitute a seizure. Since the person had the opportunity to refuse the officer's request. The officer and the citizen had a discussion which eventually led to a consensual search of Mr. Vera's car. The Court determined that this interaction was not a seizure, because the officer did not use physical force or a show of authority which restrained the liberty of the citizen in that case. In the instant case, the initial contact that Mr. Albaugh had with the officer was the officer entering his closed building, without knocking or in any way requesting his permission to enter. This crossing of the threshold and entering into his house without a warrant or invitation was the show of authority, which is absent in approaches in public places. For this reason **Vera** is not controlling in this case.

[16] The remainder of the State's arguments have already been addressed in the

Defendant's main brief.

CONCLUSION

[17] Officer Zeeb was acting in the course of his duties as a West Fargo police officer when he entered into the shop/residence occupied by the defendant, Ronald Albaugh. This entry is not justified by the community caretaking exception to the Fourth Amendment, nor was it consensual, as there was no disturbance going on, and Officer Zeeb had not received an invitation to enter the premises. The entry into the shop/residence of the defendant without a warrant and without justification turned what might have been acceptable behavior, if done on a public street, into a seizure, as the Officer was demanding the defendant produce identification for him.

[18] The entry and subsequent actions violated Mr. Albaugh's constitutional right to be free from unreasonable searches and seizures. All of the evidence which was obtained from the search of Mr. Albaugh's shop/office came after his rights were violated and therefore, it is all fruit of the poisonous tree and must all be suppressed.

Respectfully submitted this 20th day of March, 2007.

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Defendant and Appellant :

I, William S. Kirschner, hereby certify that pursuant to Rule 3 North Dakota Rules of Appellate Procedure, that on March 20, 2007, I emailed, a true and correct copy of the following documents:

APPELLANT'S REPLY BRIEF
ATTORNEY'S CERTIFICATE OF SERVICE

The copies of the foregoing were sent by electronic mail addressed as follows:

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That the above documents were duly served in accordance with the provisions of the North Dakota Rules of Appellate Procedure and Administrative Order 16

William S. Kirschner