

ORIGINAL

20060334

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEB 08 2007
STATE OF NORTH DAKOTA

State of North Dakota, :

Plaintiff and Appellee :

-v- :

Ronald Gene Albaugh, :

Defendant and Appellant :

Supreme Court No.20060334

District Court No. 05-K-03570

APPELLANT'S 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES [1]

ISSUES PRESENTED [3]

STATEMENT OF THE CASE [1]

FACTS [4]

ARGUMENT [12]

Officer Zeeb’s entry and conduct after entry into Mr. Albaugh’s shop/residence violated Mr. Albaugh’s right to be free from an unconstitutional search and seizure, and the evidence obtained thereby must be suppressed

1. The Fourth Amendment requires the suppression of evidence obtained as the result of a search conducted without a warrant, except under certain exceptional circumstances. [12]

2. The District Court’s conclusion that Officer Zeeb was involved in a community care taking function when he entered the premises. is fully reviewable by this Court.. [14]

3. Mr. Albaugh had a reasonable expectation of privacy in his shop/residence. [15]

4. Officer Zeebs entry and activities in the Shop/residence are not justified by the Community Caretaking Exception to the Fourth Amendment. [16]

CONCLUSION [30]

TABLE OF AUTHORITIES

North Dakota Cases

City of Grand Forks v. Zejdlik, 551 N.W.2d 772 (N.D. 1996)..... [14]

Rist v. North Dakota Department of Transportation, 2003 ND 113, 665 N.W.2d 45 [16]

State v. Blumler, 458 N.W.2d 300 (N.D. 1990) [13]

State v. Boyd. 2002 ND 203. 654 N.W.2d 392. [17,23]

State v. DeCoteau, 1999 ND 77, 592 N.W.2d 579. [18,21-22]

State v. Haverluk, 2000 ND 178, 617 N.W.2d 652..... [14]

State v. Keilen, 2002 ND 133, 649 N.W.2d 224 [19-22]

State v. Langseth, 492 N.W.2d 298 (N.D. 1992) [17]

State v. Nelson, 2005 ND 11, 691 N.W.2d 218 [14]

State v. Winkler, 552 N.W. 2d 347(N.D. 1996) [12]

Wibben v. N.D. State Highway Comm`r, 413 N.W.2d 329 (N.D. 1987) [17]

United States Supreme Court Cases

Cady v. Dombrowski, 413 U.S. 433 (1973) [16]
Horton v. California, 496 U.S. 128 (1990) [12]
Katz v. United States, 389 U.S. 347 (1967) [12]
Mapp v. Ohio, 367 U.S. 643 (1961) [13]
Minnesota v. Olson, 495 U.S. 91 (1990) [15]
Wong Sun v. United States, 371 U.S. 471 (1963) [13]

North Dakota Constitutional Provisions

Article 1, Section 8 [12]

United States Constitutional Provisions

Fourth Amendment. [3,12,15-17]

ISSUE PRESENTED

Whether the West Fargo Police Officer's uninvited entry into Mr. Albaugh's shop/residence and his demand that Mr. Albaugh provide him identification violated Mr. Albaugh's right to be free from unreasonable searches and seizures?

The District Court ruled that it did not.

STATEMENT OF THE CASE

[1] This case involves the appeal of the denial of a pretrial motion to suppress evidence by the District Court. Subsequent to the denial of said Motion, the defendant entered a conditional guilty plea to the one Count of Possession of a Controlled Substance, a Class C Felony, and two Counts of Possession of Drug Paraphernalia, one count a Class C Felony, and the other a Class A misdemeanor.(Appendix, pp. 14-18). After entry of Judgment, the Defendant filed his Notice of Appeal with this Court. (Appendix, p. 26).

[2] The Defendant, Ronald Gene Albaugh, hereinafter, "Mr. Albaugh" was charged with one count of possession of a controlled substance, methamphetamine, a Class C Felony, and two counts of possession of drug paraphernalia, one a Class C Felony, and the other a Class A misdemeanor by an information dated September 19, 2005. (Appendix, pp. 4-5). He pled "Not Guilty" and was appointed counsel and the matter was set on for jury trial.

[3] The Defendant filed a Pretrial Motion to Suppress the evidence against him, claiming that his constitutional rights to be free from unreasonable searches and seizures had been violated. (Appendix, p. 6). A hearing was held on the motion on July 19, 2006. The Court issued it's Order denying the Defendant's Motion on September 8, 2006. (Appendix, pp. 7-13). The Court concluded that the entry of Officer Zeeb into the shop/residence of Mr. Albaugh was justified by the

“community caretaker exception” to the Fourth Amendment, and that the subsequent seizure of the contraband was justified because it was either in plain view, or was seized during a search incident to Mr. Albaugh’s arrest. On November 13, 2006, the Defendant entered a Conditional Guilty plea reserving his right to appeal the denial of the Motion to Suppress. (Appendix, pp. 14-18). The Criminal Judgment and Sentence was entered that day. (Appendix, pp. 19-25). On November 20, 2006, the Defendant filed his Notice of Appeal with the District Court. (Appendix. p. 26)

FACTS

[4] On September 17, 2005, West Fargo Police Officer Ken Zeeb was dispatched to 710 Center Street in West Fargo. (Tr. P. 7). When he arrived at that address, Officer Zeeb met with a gentlemen named Norm Diede, who claimed he was the owner of the property. (Tr. P.7). According to Officer Zeeb, Mr. Diede told Officer Zeeb that he had “served an eviction on his property there.” The officer understood that the 3 day notice had been served, but had no idea whether an actual Judgment for eviction had been obtained. (Tr. P.8).

[5] Mr. Diede told the officer that he had a concern that someone was still in the shop, and he was there to verify that everybody and everything had been removed. He stated he wanted the police there in case somebody was there and problems would arise. (Tr. P.8)

[6] Mr. Diede then entered the building. The officer stood in the doorway, with the door closed, but could not see anyone. He heard Mr. Diede talking to someone and he then, without invitation or a warrant, walked into the building. (Tr. P.9).

[7] Present in the building at that time was the Defendant, Ronald Gene Albaugh. (Tr. Pp. 9 & 11). Mr. Albaugh is the brother of Robert Albaugh. (Tr. P. 50). Robert Albaugh was the owner of Albaugh Construction. Albaugh Construction had leased the space on Center Avenue from Mr. Diede (Tr. P. 51, Def's Exhibit 1, Appendix pp. 27-30). The lease was a one year lease, and had been extended on a month-to-month basis after it's expiration. (Tr. P. 52). Ronald Albaugh was residing on the premises with the permission of his brother.(Tr. P. 52). Robert Albaugh had not terminated the lease, nor had Mr. Albaugh received any Court papers indicating that he had been evicted.(Tr. P. 52).

[8] After Officer Zeeb entered the building, he asked for Mr. Albaugh's identification. After Mr. Albaugh failed to find his identification in his car, Mr. Albaugh went upstairs to the loft part of the shop to look for it. Officer Zeeb asked if Mr. Albaugh minded if he came up with him, and Mr. Albaugh said no. While in the loft, Officer Zeeb spotted a marijuana paraphernalia device and a small baggie which he believed contained a form of methamphetamine. (Tr. P. 10)

[9] Officer Zeeb then arrested Mr. Albaugh and a subsequent search of the premises disclosed the additional drug paraphernalia. (Tr. P. 11). Mr. Albaugh,

while under arrest, consented to a subsequent search of the premises. (Tr. P. 35).

[10] Mr. Albaugh was subsequently charged with one count of possession of methamphetamine and two counts of possession of drug paraphernalia for the drugs and paraphernalia found in the building by Officer Zeeb, and the other officers who searched the premises.

[11] Mr. Albaugh asked the District Court to suppress all of the evidence seized by the police. He maintained that Officer Zeeb had no legal right to enter his premises, and entered the premises without permission or any other legal justification. Mr. Albaugh argues that because Officer Zeeb did not have a warrant, and had no authority to enter the premises, the evidence which he subsequently saw and seized was tainted by his original illegal entry into the building, and should be suppressed.

ARGUMENT

Officer Zeeb's entry and conduct after entry into Mr. Albaugh's shop/residence violated Mr. Albaugh's right to be free from an unconstitutional search and seizure, and the evidence obtained thereby must be suppressed.

1. The Fourth Amendment requires the suppression of evidence obtained as the result of a search conducted without a warrant, except under certain exceptional circumstances.

[12] The Fourth Amendment to the United States Constitution, made applicable by the Fourteenth Amendment, and Article 1 Section 8 of the North Dakota Constitution protects individuals from unreasonable searches and seizures. **State v. Winkler**, 552 N.W. 2d 347, 351 (N.D. 1996). When the government intrudes on an individual's reasonable expectation of privacy, a search is deemed to have occurred. *Id.* The government is required to obtain a search warrant before searching an area where an individual possesses a reasonable expectation of privacy, "subject only to a few specifically established and well-delineated exceptions." *Id.* (Quoting **Horton v. California**, 496 U.S. 128, 133 n. 4, 110 S.Ct. 2301, 2306 n. 4, 110 L.Ed.2d 112, 120-21 n. 4 (1990) (quoting **Katz v. United States**, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967))).

[13] Absent such an exception, evidence gained in violation of the Fourth Amendment's protections against unreasonable searches and seizures is inadmissible under the exclusionary rule and must be suppressed. **State v. Blumler**, 458 N.W.2d 300, 302 (N.D. 1990)(citing **Mapp v. Ohio**, 367 U.S. 643,

81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Any subsequent evidence gained as a result of the initial illegally acquired evidence is considered “fruit of the poisonous tree,” and must likewise be suppressed, unless an exception to the warrant requirement for the search exists. **Id.** (citing **Wong Sun v. United States**, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

2. **The District Court’s conclusion that Officer Zeeb was involved in a community care taking function when he entered the premises, is fully reviewable by this Court.**

[14] When reviewing a trial court's ruling on a motion to suppress, the North Dakota Supreme Court defers to the trial court's findings of fact and resolves conflicts in testimony in favor of affirmance. **City of Grand Forks v. Zejdlik**, 551 N.W.2d 772, 774 (N.D. 1996). After resolving conflicting evidence in favor of affirmance, the Court affirms the trial court's decision unless there is insufficient competent evidence to support the decision, or the decision goes against the manifest weight of the evidence. **State v. Haverluk**, 2000 ND 178, ¶ 7, 617 N.W.2d 652. Questions of law are fully reviewable. **Id.**; **State v. Nelson**, 2005 ND 11 ¶ 6, 691 N.W.2d 218. The District Court’s decision in this case that Officer Zeeb was involved in a community caretaking function, is a question of law which this Court can fully review without deference to the District Court.

3. **Mr. Albaugh had a reasonable expectation of privacy in his shop/residence.**

[15] In order for the Fourth Amendment to protect the defendant, he must have

had a reasonable expectation of privacy in the premises at 710 Center Street. Mr. Albaugh was neither the lessee nor the owner of the property. He was a guest of his brother, the lessee, living there with his knowledge and permission. Robert Albaugh was the owner of a company which had a lease for the property in question, which had not been terminated. As a guest of his brother, the defendant had a reasonable expectation of privacy in the premises. Minnesota v. Olson, 495 U.S. 91, 98-99 (1990).

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

[16] Courts have identified an area of police citizen encounters where the encounter does not constitute a Fourth Amendment seizure. These encounters are known as “community caretaking functions.” This Court has defined those citizen-law enforcement encounters which are “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute” as being community caretaking functions. Rist v. North Dakota Department of Transportation, 2003 ND 113, 665 N.W.2d 45(citing Cady v. Dombrowski, 413 U.S. 433, 441 (1973)).

[17] For Fourth Amendment purposes, this Court has held that a seizure does not occur when an officer approaches a parked vehicle, if the officer questions the occupant in a conversational manner and does not issue orders to the person or demand a response. State v. Boyd, 2002 ND 203, ¶7, 654 N.W.2d 392 (citing

State v. Langseth, 492 N.W.2d 298, 300 (N.D. 1992) (citing Wibben v. N.D. State Highway Comm'r, 413 N.W.2d 329, 334-35 (N.D. 1987) (VandeWalle, J., concurring)). However, the Court noted that even this type of encounter can become a seizure if a reasonable person would view the officer's actions, which can include an order, threat or weapons display as threatening or offensive. **Id.**

[18] In State v. DeCoteau, 1999 ND 77, 592 N.W.2d 579, this Court dealt with the issue of community caretaking relating to a home for the first time, after having considered it in several cases involving vehicles. In the DeCoteau case the police officers were called to investigate an anonymous tip regarding a domestic disturbance. When the officer's arrived, there was no disturbance. The person present clearly did not want or need the officers, nor request their assistance. Therefore, the Court concluded there was no "community caretaking" role for the officers to fill when they subsequently entered the home, without consent or probable cause.

[19] In State v. Keilen, 2002 ND 133, 649 N.W.2d 224, the North Dakota Supreme Court was asked to consider the intrusion into an apartment in Fargo by two Fargo police officers who were dispatched to an apartment building to investigate the report of a domestic dispute. When the first officer arrived on the scene, he spoke with the neighbor, who told the officer he was afraid that someone was hurt. Following this discussion the officer went to the door of the apartment

where the neighbor said the noises came from, and after listening for noise for about twenty seconds, knocked on the door and identified himself. The officer continued to knock for a minute or two without a response. He testified that he identified someone coming to the apartment door and walking away without opening the door. He continued to knock and identify himself after the person walked away, and finally, after receiving no response, the officer and his partner entered the apartment. After entering the apartment, the officers found marijuana and marijuana paraphernalia in plain view.

[20] In Keilen, the District Court denied the defendant's motion to suppress because it believed that the officer's conduct came within the community caretaker exception to the warrant clause of the Fourth Amendment. The defendants maintained that this exception "to check and see if everyone was all right," did not apply when the officers had not heard or observed any signs of a disturbance.

[21] In reviewing the applicability of the community caretaker exception to the facts in Keilen, the Supreme Court noted that in all but one of its cases up until that time, the application of the community caretaking doctrine involved vehicles. That exception was the DeCoteau case.

[22] The Court noted, that, as in DeCoteau, the situation in Keilen, was one where the officer heard no disturbance, and because "it was not discernible to the officers that anyone required assistance, the community caretaking function" did

not apply. Keilen at ¶19.

[23] The Supreme Court in State v. Boyd, supra, ¶10, noted that when a police officer issues orders and demands compliance with those orders, she removes herself from the scope of acceptable actions for officers acting as community caretakers.

[24] In this case, Officer Zeeb went to 710 Center Street after being told by his dispatcher that an individual who owned some property there had done an eviction. He was there to see that everything and everybody had been removed from the property. (Tr. P. 7). Upon meeting Mr. Deide at the premises, Officer Zeeb did not know whether Mr. Deide or the person in the premises had a right to possession of the premises, and he did not check on that (Tr. Pp13-15). The Officer “imagined that since Mr. Deide was the property owner, he had a right to be there. (Tr. P. 16). Officer Zeeb stated that he was not there to remove anything or anybody from the premises, but just in “case somebody was still there.” (Tr. P. 18) After Mr. Deide entered the premises, Officer Zeeb entered the shop/residence of Mr. Albaugh at 710 Center Street, without an invitation from either Mr. Albaugh or Mr. Diede. He had heard some discussion between them, but without hearing any disturbance or a call for him to enter the premises, he entered the premises. (Tr. Pp. 19,21). When Officer Zeeb entered the shop/residence, he immediately asked Mr. Albaugh to provide him with identification. (Tr. P. 22). During the time that Mr. Albaugh was

seeking to locate his identification, Officer Zeeb followed him into the loft area of the building and saw the contraband which led to Mr. Albaugh's arrest. (Tr. Pp. 22-24).

[25] Officer Zeeb's entry into the shop/residence of Mr. Albaugh without invitation from either Mr. Deide or Mr. Albaugh could not have been in keeping with his performing a "community caretaking function," because there was no evidence that at the time that Officer Zeeb entered into the shop/residence that anyone required his assistance. Officer Zeeb had no verifiable information that Mr. Deide had any right to be in the building, nor any right to remove anyone from the building. (Tr. 19) Officer Zeeb indicated that he wasn't there to make sure that everything and everybody was removed from the premises, just to be there is any "problems" arose. (Tr. 18)

[26] By Officer Zeeb's own account, he was only there to assist Mr. Deide in case a "problem arose." Despite the fact that no "problem had arisen, Officer Zeeb entered the premises and demanded that Mr. Albaugh provide him with identification. Prior to Officer Zeeb's entry into 710 Center Street, Officer Zeeb had heard from a fellow officer, Jason Hicks, that this location had been used, or was believed to be used for drugs or drug sales. (Tr. P. 26) This is something that was "at least" in the back of Officer Zeeb's mind when he crossed the threshold into Mr. Albaugh's shop/residence. (Tr. P. 26-7).

[27] Officer Zeeb did not have any legal justification to enter the shop/residence of Mr. Albaugh, when he did. He entered without an invitation, without any request for him to enter by anyone, and without there being some sign that his presence was necessary. Even if Officer Zeeb had entered the shop/residence to perform a “community caretaking function,” when he entered the shop/residence and discovered that nothing untoward was occurring, his actions in ordering Mr. Albaugh to provide him identification, were the actions of an officer who had removed himself from the scope of acceptable actions for officers acting as community caretakers, and were the actions of an officer who was now investigating potential criminal conduct.

[28] At the time that Officer Zeeb began his investigation, he was aware of the allegations concerning the property, and his presence in the shop/residence of Mr. Albaugh, without requesting permission from Mr. Albaugh, or receiving an invitation from a person who had the legal right to invite him onto the premises, was in violation of Mr. Albaugh’s right to be free from unreasonable searches and seizures of himself and his property. Officer Zeeb made no attempt to determine the legal status of Mr. Deide nor whether Mr. Deide had any authority to allow him into the premises. He acted in complete ignorance of the legal situation.

[29] After the unwarranted, and unjustified entry into his premises, Mr. Albaugh’s concession to allowing the officer to follow him up the stairs to the loft,

was merely a concession to the officer's apparent authority to do whatever he wished.

CONCLUSION

[30] The entry by Officer Zeeb into the shop/residence occupied by the defendant, Ronald Albaugh, was without any express invitation from either Mr. Albaugh or his landlord. The entry violated Mr. Albaugh's constitutional right to be free from unreasonable searches and seizures. The subsequent action of Officer Zeeb in demanding Mr. Albaugh's identification was also a seizure without justification in the law. 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 7th day of February, 2007.

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Ronald Gene Albaugh, : District Court No. 05-K-03570
Defendant and Appellant :

I, William S. Kirschner, hereby certify that pursuant to Rule 3 North Dakota Rules of Appellate Procedure, that on February 8, 2007, I emailed, a true and correct copy of the following documents:

APPELLANT'S 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