ORIGINAL (e-filed) 20070080

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff & Appellee,	)	Supreme Court No. 20070080
v.	)	Stutsman County District Court No. 47-04-K-1111
Andrew T. Jager, Defendant & Appellant,	)	

APPELLEE'S BRIEF

Appeal from the
Criminal Judgment
Dated February 15, 2007,
by the Honorable Mikal Simonson
Judge of the Southeast District Court

Jay Schmitz (ID # 05705)
Assistant State's Attorney, Stutsman County
511 Second Avenue Southeast
Jamestown, ND 58401
(701) 252-6688

Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUES PRESENTED

1. Whether the District Court abused its discretion in ruling that the evidence discovered during the search of the juvenile R.T. at the defendant's motel room was relevant and admissible at the defendant's trial for possession of drug paraphernalia because the State had shown a sufficient nexus between that evidence and the defendant?

STATEMENT OF THE CASE
AND
STATEMENT OF FACTS

1. The State of North Dakota ("State") will join appellant/defendant Andrew Jager's Statement of the Case.

2. The State also will join in the defendant's Statement of Facts.

LAW AND ARGUMENT

3.THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE EVIDENCE FOUND DURING THE SEARCH OF THE JUVENILE AT THE DEFENDANT'S MOTEL ROOM

4. The sole issue on this appeal is whether the district court properly found that the State had established a sufficient "nexus" between the defendant and the juvenile RT to admit the drug paraphernalia – spoons with methamphetamine residue – found during the search of the juvenile as evidence against the defendant. As the defendant correctly notes, the trial court's ruling on admissibility of evidence is reviewed under the "abuse of discretion" standard:

> "A trial court has broad discretion when deciding evidentiary matters. Davis v. Killu, 2006 ND 32. ¶ 6, 710 N.W.2d 118. On appeal, this Court will not overturn the trial court's admission or exclusion of evidence unless the trial court has abused its discretion. Id. Abuse of discretion occurs when a trial court acts arbitrarily, unconscionably, or unreasonably, or when a decision is not based on a rational mental process. Id." State v. Freidt, 2007 ND 108, ¶8.

5. The district court properly found that the evidence was relevant to prove the defendant possessed paraphernalia associated with the use of methamphetamine. Relevancy has two facets: The first is "logical" relevancy, defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (N.D.R.Evid. 401), and is a "preliminary question concerning . . . the admissibility of evidence" to be determined by the court under Rule of Evidence 104(a). The second aspect is "conditional" relevancy, the determination of whether

the factual conditions exist to make the logical connection between the evidence and a material issue in the case. N.D.R.Evid. 104(b). Conditional relevancy is for the most part a question for the jury, as Rule 104(b) provides that the trial court "shall" admit the evidence if it determines that sufficient foundational evidence has been introduced for the jury to find that the factual conditions exist to make the evidence logically relevant.

6. The defendant's appeal is directed at the issue of conditional relevancy, i.e., whether a sufficient "nexus" existed between the defendant and the evidence found in the search of RT to allow a logical inference that the defendant possessed drug paraphernalia on November 3, 2004. The defendant does not dispute that he had rented the motel room, or that a motel maid had called the police because she had found a spoon covered with a powdery residue while cleaning the defendant's room. See transcript of the May 11, 2005, suppression hearing ("T1") at p. 26, lines 12-17; and p. 4, line 8 through p. 5, line 25.[1] The defendant's connection to, and control of, the motel room was also evidenced by his appearance in the motel parking lot while the task force officers were talking to the motel employees – and by his abrupt exit upon seeing a marked patrol car sitting there. See T1, p. 27, lines 1-12.

7. Therefore, as the district court ruled in its initial order on the defendant's motion in limine (Appendix, p. 35), the residue-laden spoons found in RT's bag were relevant and admissible *if* the State laid a sufficient foundation to support a finding by the jury that RT had taken the spoons from the defendant's motel room. The trial court properly limited its role to making a preliminary determination that there was sufficient evidence for a jury to find that the defendant made a telephone call to RT asking him to remove paraphernalia from the defendant's motel

[1] The motel manager and the maid testified to these facts at trial.

room, and that the items found in RT's possession had in fact been taken from the room – the "conditions of fact" upon which the relevancy of the evidence depended. N.D.R.Evid. 104(b); cf. R&D Amusement Corp. v. Christianson, 392 N.W.2d 385, 386 (N.D. 1986).

8. The State introduced sufficient, indeed ample, evidence to allow the trial court to make the preliminary determinations that there was a "nexus" between the defendant, the juvenile RT, and the evidence found during the search of RT. See the Order dated Feb. 2, 2006 (Appendix, p. 37). Officer Scott Edinger of the task force testified to seeing a cell phone in the car in which the defendant was riding at the time of the traffic stop. See transcript of the December 9, 2005, hearing ("T2") at p. 27, line 22 through p.29, line 4. RT testified at the hearing that he was at the Buffalo Mall on the morning of November 3, 2004, when he received a telephone call from defendant Andy Jager asking RT to "clean out his [Jager's] hotel room" (T2, p. 35, line 20, through p.37, line 15); and that the drug paraphernalia in the bag RT was carrying at the time of the search by Officer Edinger – including three spoons that subsequently tested positive for methamphetamine at the State Lab – was taken from the defendant's hotel room. T2, p. 35, lines 2-19. RT also testified that he got the call from the defendant about 15-20 minutes before RT arrived at the motel room (T2, p. 37, lines 18-19), which made the call coincident in time with the entry and quick exit of the motel parking lot by the defendant's car, and the pursuit and stop of the car by the police officers – thus supporting the inference that Jager called RT to clean out the room because he knew the officers were away from the motel.[2]

[2] RT also testified at trial, thus allowing the jury to assess his credibility and make its own determinations as to whether the conditions of fact existed to make the logical connection between the defendant to the paraphernalia found in RT's bag.

9. The defendant contends that the district court abused its discretion by admitting the paraphernalia found during the search of RT into evidence because the defendant did not have a cell phone in his possession at the time he was booked into the Stutsman County Correctional Center. See T2. p. 26, line 17, through p.27, line 21. That contention is patently incorrect under the standards of Rule of Evidence 104(b), which states that evidence *shall* be admitted if its proponent introduces a sufficient foundation to support a jury finding that it is what the proponent claims it to be. In this case, the State introduced more than enough evidence for a reasonable juror to conclude the paraphernalia found in RT's bag had been in the defendant's motel room until just a few moments before – and thus logically relevant to prove that the defendant had been in actual or constructive possession of drug paraphernalia on or about November 3, 2004, as charged in the Criminal Information. Appendix, p. 4.

CONCLUSION

10. For the foregoing reasons, plaintiff and appellee State of North Dakota respectfully requests that the Court affirm the district court's judgment and sentence in this matter.

RESPECTFULLY SUBMITTED this 10th day of July, 2007.

STUTSMAN COUNTY STATE'S ATTORNEY OFFICE
Attorneys for Appellee
511 2nd Avenue SE
Jamestown, ND 58401
(701) 252-6688

Signed: JAY A. SCHMITZ
Assistant State's Attorney (ID# 05705)

AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

STATE OF NORTH DAKOTA)
) :ss
COUNTY OF STUTSMAN)

Jay A. Schmitz, being first duly sworn on oath, does depose and say:

That he is a citizen of the United States, of legal age, and not a party to the above entitled action.

That on the 10th day of July, 2007, the affiant caused the Appellee's Brief in the matter of State of North Dakota v. Andrew T. Jager to be filed electronically with the Clerk of the North Dakota Supreme Court by attaching the computer file containing said Brief to an e-mail transmission sent to the following address:

supclerkofcourt@ndcourts.com

That the Appellee's Brief was served electronically on counsel for the appellant herein by attaching the computer file containing said Brief to an e-mail transmission sent to the following address which is known to the affiant to be the office e-mail address of the attorney for the appellant:

ssandness@hotmail.com

That to the best of the affiant's knowledge, information and belief, such addresses as given above were the actual e-mail addresses of the parties intended to be served.

Signed: Jay A. Schmitz
Jay A. Schmitz

SUBSCRIBED and SWORN to before me this 10th day of July, 2007.

Signed: Cynthia A. Holzkamm
NOTARY PUBLIC
My Commission Expires: 2-17-2010