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20070081

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, vs. Brian Shawn Hurt, Defendant and Appellant.	)	Supreme Court No. 20070081 District Ct. No. 06-K-01542

APPELLEE'S BRIEF

Appeal from the February 20, 2007 Criminal Judgment and Commitment
East Central Judicial District
Cass County, North Dakota
The Honorable Douglas R. Herman

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[¶4] STATEMENT OF CASE

[¶5] On February 20, 2007, the Defendant entered conditional pleas of guilty to two counts of possession of drug paraphernalia. A Criminal Judgment and Commitment was entered against the Defendant on that same day. The Defendant reserved his right to appeal from the judgment to seek review of the district court's determination on a prior suppression motion. The Defendant appeals to this Court, asserting the district court erred in determining the suppression motion. The State seeks affirmation of the judgment.

[¶6] STATEMENT OF FACTS

[¶7] On April 21, 2006, probation officers went to 1544 East Gateway Circle, #101, in Fargo, North Dakota, to conduct a home visit on a resident of the apartment, Jessica Bickler. (Appellee's Appendix "AA" at 11, lines "ll." 10-14.) Bickler had failed to report for probation office visits on April 4, 2006, and April 21, 2006. (AA at 11, ll. 14-15; AA at 12. l. 1.) Bickler was subject to supervised probation under a September 23, 2005, judgment entered after she pled guilty to controlled substances crimes. (AA at 10, ll. 2-9; Appendix to Brief of Appellant "A" at 7.) The judgment included a probation provision requiring Bickler to submit to a search of her residence "with or without a search warrant, at any time of day or night[.]" (A at 11.)

[¶8] While outside the apartment building, the probation officers asked Rosally Mortenson, the Defendant's girlfriend, if she would let them in the secured entrance to the building. (AA at 27, ll. 6-12.) Mortenson allowed them to enter. (AA at 27, ll. 11-12.) Mortenson and the probation officers went to Bickler's apartment door and knocked. (AA at 11, ll. 16-19; AA at 28, ll. 12-17.) After Bickler opened the door, Mortenson and the probation officers went into the apartment. (AA at 11, ll. 19-20; AA at 29, ll. 8-14.)

Although the Defendant and others were in the living room at the apartment, and did not see the officers come in. (AA at 29, ll. 24-25; AA at 30, l. 1; AA at 30, ll. 24-25; AA at 31, l. 1.) There was an odor of marijuana in the apartment. (AA at 19, l. 11.)

[¶9] The probation officers asked the nonresidents to leave the apartment. (AA at 12, ll. 10-15.) The Defendant admitted he was a resident, and he and Bickler remained in the apartment. (AA at 12, ll. 16-20.) Probation officers saw drug paraphernalia on the coffee table in the living room. (AA at 12, ll. 22-23.) The Defendant was arrested for possession of drug paraphernalia, and, during a search incident to arrest, an officer found a glass pipe with apparent drug residue in the sweatshirt the Defendant was wearing. (AA at 13, ll. 7-24; AA at 19, ll. 15-22; AA at 22, ll. 6-14.)

[¶10] The Defendant was charged with two counts of possession of drug paraphernalia. (A at 3.) The Defendant submitted a motion to suppress, asserting the officers obtained evidence in violation of his constitutional rights. (A at 5.) A hearing on the motion was held on September 13, 2006. (AA at 1.) The district court denied the motion, concluding the evidence was obtained as a result of a reasonable probation search of the apartment and, subsequently, an appropriate search incident to the Defendant's arrest. (A at 17; AA at 37.) After entering conditional pleas of guilty, the Defendant submitted a notice of appeal dated March 20, 2007. (A at 27.)

[¶11] LAW AND ARGUMENT

[¶12] The probation officers' entry into the common areas of the apartment shared by the Defendant and the probationer was a reasonable probation search.

[¶13] The Defendant contends the probation officers entered the apartment without justification and the district court erred in denying his motion to suppress.

[¶14] Generally, a district court's denial of a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the findings and if the decision is not contrary to the manifest weight of the evidence. See State v. Oien, 2006 ND 138, ¶ 7, 717 N.W.2d 593. Questions of law are subject to full review, and whether a factual finding meets a legal standard is a question of law. See State v. Graf, 2006 ND 196, ¶ 7, 721 N.W.2d 381.

[¶15] The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment and Article I, § 8 of the North Dakota Constitution protect individuals from unreasonable searches and seizures. See State v. Oien, 2006 ND 138, ¶ 8, 717 N.W.2d 593. The exclusionary rule requires the suppression of any evidence obtained as a result of a violation of the Fourth Amendment's protections against unreasonable searches and seizures. See State v. Wahl, 450 N.W.2d 710, 714 (N.D.1990). The "rule acts to deter police misconduct in making unreasonable searches and seizures, and to bolster judicial integrity by not allowing convictions based on unconstitutionally obtained evidence." Id. A warrantless entry and search generally is unreasonable and violates the Fourth Amendment unless it falls within a recognized exception to the search warrant requirement. See State v. Woinarowicz, 2006 ND 179, ¶ 20, 720 N.W.2d 635.

[¶16]"The conditions-of-probation search is one of the exceptions to the warrant requirement." See State v. Smith, 1999 ND 9, ¶ 13, 589 N.W.2d 546. Like a state's operation of a school, government office or prison, the operation of a probation system "presents special needs beyond normal law enforcement that justify a departure from the warrant and probable cause requirements." Id. at ¶ 15 (internal quotations and citations omitted). This Court, accordingly, acknowledged:

> conditions of probation requiring the probationer to submit to warrantless searches by probations officers or law enforcement officers, to the extent such searches contribute to the rehabilitation process; are not used as a subterfuge for criminal investigations; and are performed in a reasonable manner, are valid and not violative of the Fourth Amendment.

Id. at ¶ 16 (citing State v. Perbix, 331 N.W.2d 14, 21 (N.D. 1983)).

[¶17] **A. Persuasive case law indicates officers may enter the common areas of a residence shared by a probationer and nonprobationer to conduct a probation search.**

[¶18] In United States v. Moser, 240 F. Supp. 2d 1068, 1077 (D. N.D. 2003), the court concluded a nonprobationer who lived with a probationer "had no reasonable expectation of privacy in the common areas of [their] residence." In Moser, Denver Evans lived with his girlfriend, Amy Moser, who was subject to supervised probation. United States v. Moser, 240 F. Supp. 2d 1068, 1069 (D. N.D. 2003). Moser failed to appear for a scheduled probation appointment. Id. Moser's probation officer discovered Moser's telephone had been disconnected and learned of a reliable anonymous tip indicating methamphetamine was being manufactured at Moser's residence. Id. Officers went to the residence to determine Moser's whereabouts and to conduct a probation search. Id. at 1070. Moser answered the door and both she and Evans agreed to allow the search. Id. Numerous items of contraband were located in the residence. Id. Evans later contended the search of the residence violated his Fourth Amendment rights. Id.

[¶19] The court in Moser recognized the cornerstone of the Fourth Amendment is reasonableness, and reasonableness is decided by assessing, on one hand, the degree to which a search intrudes upon a person's privacy and, on the other hand, the degree to which the search is needed to further legitimate governmental interests. Id. at 1072. Further, "the

advancement of the state's interest in rehabilitating a probationer [does] not have to come at the expense of the state's interest in maintaining law and order." Id. The court concluded "[t]here was a reasonable basis to believe that a probation violation had occurred and/or was occurring and that a warrantless search was needed for probationary purposes." Id. at 1074. The court also reasoned the warrantless search of the residence was reasonable, justified, and consented to under the circumstances. Id. at 1075.

[¶20] Other courts have similarly concluded probation officers may reasonably search the common areas of a residence shared by probationer and nonprobationer. "Persons who live with probationers cannot reasonably expect privacy in areas of a residence that they share with probationers." People v. Pleasant, 19 Cal. Rptr. 3d 796, 798 (Cal. App. 4d 2004). "The fact that a probationer shares a residence with another does not nullify the authority of probation and law enforcement officers to conduct a properly justified warrantless search of the probationer's shared residence." State v. Yule, 905 So. 2d 251, 264 (Fla. App. 2d 2005); see also United States v. Crew, 345 F. Supp. 2d 1264, 1266 (D. Utah 2004) (concluding "[w]hen the parolee, as a cohabitant of premises, gives consent to enter and to search, that consent is valid as to his personal space and all common space"); State v. Walker, 158 P.3d 220, 224-25 (Ariz. Ct. App. 2007) (concluding evidence found in the shared and common areas of a probationer and nonprobationer's residence could be used against the nonprobationer).

[¶21] In the case at hand, the officers' entry into the common areas of the Defendant's apartment was a reasonable probation search. The Defendant's roommate, Bickler, was required, as a condition of her probation, to submit to a search of her residence. Bickler had violated the terms of her probation by failing to report for office visits on two occasions. The

Defendant likely knew Bickler was on probation because the Defendant's girlfriend apparently knew and the Defendant had lived with Bickler at another residence before living with her at 1544 East Gateway Circle, #101, in Fargo. (AA at 31, ll. 21-25; AA at 32, ll. 1-9.) Regardless, the Defendant chose to live with Jessica Bickler and he chose to do so knowing as little or as much as he did about her. The Defendant could not "reasonably expect privacy in areas of a residence [he] share[d] with [Bickler]." See People v. Pleasant, 19 Cal. Rptr. 3d 796, 798 (Cal. App. 4d 2004); see generally United States v. Matlock, 415 U.S. 164, 171, n.7 (1974) (indicating a tenant assumes the risk his co-tenant will permit the common areas to be searched). It was reasonable for the officers to enter the common areas of Bickler's apartment.

[¶22] B. Under the principles of Georgia v. Randolph, 547 U.S. 103 (2006), the Defendant "loses out" because he neither was present at the door nor objected to the officers' entry.

[¶23] The Defendant contends Georgia v. Randolph, 547 U.S. 103 (2006) supports a ruling the probation search was valid as to Jessica Bickler but invalid as to the Defendant because he did not consent to the search. (Brief of Appellant at ¶¶ 20-24.) Assuming for sake of argument the principles in Randolph should be applied to a probation search, the Defendant has failed to demonstrate he would be entitled to protection under such principles.

[¶24] In Randolph, the Court addressed the issue of whether a warrantless search and entry of a home is lawful when one co-tenant consents to the search and the other co-tenant "is present at the scene and expressly refuses to consent." Georgia v. Randolph, 547 U.S. 103, (pinpoint pages not currently available electronically for U.S. Reporter), 126 S. Ct. 1515, 1518-19 (2006). A law enforcement officer asked Scott Randolph for permission to search his house and Scott "unequivocally refused." Id. at 1519. The officer then turned to

Scott's wife, Janet, who readily gave consent to search. Id. Officers searched and found incriminating evidence. Id.

[¶25] The Court acknowledged consent to search given by one co-tenant is valid as against an absent co-tenant with whom authority to consent is shared. Id. Distinguishing such situation from the one in Randolph, the Court held a warrantless search of a shared dwelling over the "express refusal of consent by a physically present resident" cannot be justified as to such resident on the basis of consent given by another resident. Id. at 1526. The Court indicated it was drawing a fine line:

> if a potential defendant with self interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.

Id. at 1527 (emphasis added).

[¶26] Here, the Defendant neither was at the door nor objected to the search. The Defendant's own witness testified the Defendant was not even aware the officers had entered. (AA at 29, ll. 24-25; AA at 30, l. 1.) Under the principles of Randolph, the Defendant "loses out" and would not be entitled to assert the search was unreasonable.

[¶27] The Defendant also appears to suggest probation officers must actively seek and obtain consent from a nonprobationer/co-tenant to search a residence of a probationer. (Brief of Appellant at ¶ 35.) Such suggestion is contrary to the fine line drawn in Randolph, and there is no authority cited to support the suggestion.

[¶28] **C. The primary principle of Ybarra v. Illinois, 444 U.S. 85 (1979) is inapplicable because the officers saw an item in plain view which provided probable cause to arrest the Defendant.**

[¶29] The Defendant also relies on Ybarra v. Illinois, 444 U.S. 85 (1979) in support

of his argument. (Brief of Appellant at ¶¶ 25-26.) In Ybarra, law enforcement officers obtained a warrant to search a bar and its bartender identified as "Greg." Ybarra v. Illinois, 444 U.S. 85, 88 (1979). An Illinois statute authorized officers to search persons found within a premises subject to a search warrant. Id. at 87. While executing the warrant, an officer patted down Ventura Ybarra, a bar patron, and felt what appeared to be a cigarette pack with items in it. Id. at 88. The officer patted down others before returning to Ybarra and retrieving the apparent cigarette pack. Id. at 88-89. The officer found heroin inside the cigarette pack. Id. at 89. Ybarra challenged the search. Id.

[¶30] The Court noted there was not probable cause to search Ybarra either at the time the warrant was issued or when it was executed. Id. at 90. The Court further noted the search warrant gave the officers authority to search the bar and "Greg," but gave no authority to search other individuals located in the bar. Id. at 92. The Court, accordingly, concluded the search of Ybarra was unconstitutional. Id. at 96.

[¶31] In this case, the primary principle of Ybarra is inapplicable. The officers did not search the Defendant himself based upon Bickler's probation conditions. If they had, Ybarra may well be analogous. The probation officers, while executing the probation search, saw an item in plain view on a coffee table in a common area of the apartment which implicated the Defendant. An officer subsequently arrested and searched the Defendant incident to arrest. Ybarra thus does not provide support for the Defendant's argument.

[¶32] **D. There is no law enforcement conduct to deter.**

[¶33] Although the Defendant suggests the "government should be encouraged to keep probation searches in their proper sphere," there is no law enforcement conduct that should be deterred in this case. (Brief of Appellant at ¶ 34.) The Defendant admits there

was no subterfuge, indicating "[t]he case against Mr. Hurt was simply a bonus: something the probation officers were not expecting or seeking." (Id.)

[¶34] The officers were acting appropriately by visiting and entering a noncomplying probationer's residence. The officers entered the common areas of the residence and made a plain view observation of the pipe on the coffee table prior to arresting the Defendant. See State v. Albaugh, 2007 ND 86, ¶ 18 (explaining an officer may seize a clearly incriminating item without a warrant if the officer is lawfully in a position from which the item and its readily apparent criminal nature can be viewed). The officers searched the Defendant himself only after the Defendant had been arrested. (AA at 19, ll. 13-22; AA at 24, ll. 15-24.) Because the officers conducted a reasonable probation search in the common areas of the residence, there is no justification to suppress the evidence they found.

[¶35] CONCLUSION

[¶36] The State respectfully requests the Court affirm the district court judgment.

Respectfully submitted this 29th day of June, 2007

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[¶37] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on 29th day of June, 2007, to: Jesse Lange at: jesselange@att.net

Reid A. Brady