ORIGINAL

20070140

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20070140

State of North Dakota,

Plaintiff-Appellee,

- vs -

Steven A. Torkelsen,

Defendant-Appellant.

PETITION FOR REHEARING

BENJAMIN C. PULKRABEK
Attorney for Appellant

402 First Street NW
Mandan, ND 58554
(701)663-1929
N.D. Bar Board ID No. 02908

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. Should defendant-appellant, Steven A. Torkelsen's motion to suppress evidence have been granted?

2. Should defendant-appellant, Steven A. Torkelsen's request to represent himself at trial been granted?

NATURE OF THE CASE

A jury found Defendant-Appellant, Steven A. Torkelsen guilty of murder. Torkelsen appealed the murder conviction to the North Dakota Supreme Court. The North Dakota Supreme Court upheld the murder conviction.

Torkelsen is now petitioning the North Dakota Supreme Court for a rehearing of his appeal.

STATEMENT OF FACTS

In State v. Torkelsen, 2006 ND 152, 718 N.W.2d 22, this Court reversed the criminal judgment, concluding the initial stop of Torkelsen's vehicle was illegal because at the time of the stop, the officers did not have a reasonable and articulable suspicion Torkelsen had engaged in criminal activity.

On remand, Torkelsen moved to suppress his videotaped interviews and the evidence found in the camper, pickup, and his parents' house, arguing the evidence was seized as a result of the illegal stop of his vehicle and, therefore, the evidence must be suppressed as "fruit of the poisonous tree."

The district court denied his motion and concluded the evidence was admissible because Torkelsen voluntarily consented to the searches of his person, camper, and truck; and taint of the illegal stop was purged; there was probable cause to issue a search warrant for Torkelsen's parents' home, but there was not probable cause for a nighttime search warrant; the nighttime search warrant did not satisfy the good-faith exception; the evidence found in the camper and Torkelsen's parents' house would have been inevitably discovered; the evidence from the camper and pickup would have been found in a search authorized by Torkelsen's probation officer.

The North Dakota Supreme Court upheld all of the district courts rulings on evidence except the district courts ruling regarding the evidence taken from Defendant's parents home. As to that evidence the North Dakota Supreme Court found it admissible by upholding the search warrant.

During the trial, Torkelsen attempted to play an active role in his defense by,

writing letters to the court, filing motions, and often interrupting proceedings if he thought something was not being done correctly. Previous court appointed attorneys withdrew their representation of Torkelsen. The attorney who represented him at trial, Thomas E. Merrick, also moved to withdraw as counsel. During the fifth day of trial, Torkelsen asked the court whether it would accept Merrick's motion to withdraw as counsel, and the court denied his request.

When Torkelsen asked that the trial court accept his attorney's motion to withdraw, he said in ¶ 44, "I ask that now you do accept his motion to withdraw as counsel." "And I–I insist that either I alone sit here and be allowed to ask these questions so I'm not tugging on his sleeve and being ignored." "Now, either he's going to ask him or I–or I'll sit here and ask him. It will take me longer in between questions, but at least I'll–there will be some thought put into each question."

ARGUMENT

1. Should Defendant-Appellant, Steven A. Torkelsen's motion to suppress evidence have been granted?

State v. Torkelsen, 2006 ND 152, 718 N.W.2d 22 made the initial stop of Torkelsen's vehicle illegal because at the time of the stop the officers didn't have reasonable articulate suspicion Torkelsen had engaged in a criminal activity. Therefore, because Torkelsen had consented to searches after the illegal stop, the question for the State was, "What needs to be done to purge the taint of the illegal stop and allow the State to get in the evidence obtained by law enforcement after the illegal stop?"

The answer to this question and the way such evidence can be admitted is found out

in State v. Torkelsen, 2008 ND 141 at ¶ 23:

"Although Torkelsen voluntarily consented to the interviews and searches of his camper and pickup, the inquiry does not end there because, according to our prior decision, the consent was preceded by illegal police action. Generally, evidence unlawfully seized in violation of the Fourth Amendment must be suppressed under the exclusionary rule. State v. Utvick, 2004 ND 36, ¶ 26, 675 N.W.2d 387. "Any evidence obtained as a result of illegally acquired evidence must [also] be suppressed as 'fruit of the poisonous tree'. . . ." State v. Gregg, 2000 ND 154, ¶ 39, 615 N.W.2d 515. However, evidence characterized as fruit of the poisonous tree may still be admitted if "it was not produced by exploiting the illegally acquired information." Id. "This 'unpoisoning' of the fruit may be achieved by the State through the use of the 'independent-source exception,' the 'inevitable-discovery exception,' or the 'attenuation exception' to the exclusionary rule." Id. at ¶ 40.

Torkelsen believes that there were no intervening circumstances occurring between the time of the illegal stop and his consents. Therefore, his consents were not an act of his free will and an independent cause of discovery.

Torkelsen believes his factual situation has many similarities to City of Devils Lake v. Grove, 2008 ND 155. These similarities in Grove are as follows at ¶ 18:

"We conclude the officers' transportation of Grove from the site of the traffic stop to the Law Enforcement Center could not be supported on reasonable suspicion alone and constituted a de facto arrest. The City concedes the officers lacked probable cause to arrest Grove. The arrest, therefore, violated Grove's Fourth Amendment interests. Thus, we hold the district court properly granted Grove's motion to suppress."

Torkelsen believes because of the above factual similarities in his case with Grove. he is entitled to the same result in Grove. the suppression of evidence.

The following facts in Torkelsen's case must be considered a part of the totality of circumstances:

1. The fact that after the law officer's illegal stop they took him from his vehicle to the Sheriff's car, hand cuffed him and drove him to the Towner County Sheriff Office in Cando, North Dakota.

2. The fact that the law officer's claim he was hand cuffed for his own protection. when the only persons present were law enforcement officers.

3. Why did Torkelsen need protection from the law officers?

4. The fact that if Torkelsen was handcuffed. he had to be under arrest.

5. The fact that Torkelsen had no choice but to ride with the law officers to the Sheriff's office in Cando.

6. The fact that he did not talk during his ride to the Sheriff's office is permitted by Miranda.

7. The fact that the reading of the Miranda Warning to an individual usually means the investigation is focusing on that individual and he is about to be or is arrested.

8. The fact that Law Officers don't usually read the Miranda Warning to witnesses before they are interviewed.

9. The fact that Torkelsen was confused when he was read the Miranda Warning and then told he wasn't arrested.

10. The fact that law officers don't drive an individual 29 miles in handcuffs and

then tell him he wasn't under arrest during the 29 mile drive.

11. The fact that Torkelsen was never told he could leave at the scene of the illegal stop or at any other time before he consented to the search.

12. The fact that Torkelsen's leaving of the Sheriff's office would have been difficult because after arriving at the Sheriff's office, his vehicle was at the scene of the illegal stop, 29 miles away.

13. The fact that if such events as feeding Torkelsen, changing law officers, and letting time pass between interviews are cleansing events that will purge that taint of an illegal stop that law officers, in the future, will always be able to make illegal stops as long as after the illegal stop they perform these cleansing events.

14. The fact that giving a breathalyser test to Torkelsen indicates he was arrested for a DUI.

15. The fact that breath tests are normally used when questioning witnesses.

Torkelsen's consents were statements. The standard for determining voluntariness of statements are set out in State v. Haibeck 2004, ND 163, 685 N.W.2d 512:

"The totality of the circumstances must be examined to determine voluntariness. The inquiry focuses on two non-determinative elements: (1) the characteristics and conditions of the accused at the time of the confession, including the age, sex, race, education level, physical or mental condition, and prior experience with police; and (2) the details of the setting in which the confession was obtained, including the duration and conditions of detention, police attitude toward the defendant, and the diverse pressures that sap the accused's powers of resistance of self-control."

Torkelsen was one confused individual when he consented to the searches. Wouldn't anyone be confused who is:

1. Taken from his vehicle, placed in handcuffs and driven 29 miles to the Sheriff's office.

2. Then, after arriving at the Sheriff's office being read his Miranda Rights, and then told he wasn't under arrest, but not told he was free to leave the Sheriff's office.

3. Then, given a breath test during questioning.

In Torkelsen's case, an additional fact to be considered is, Torkelsen was on parole and believed he had to consent to the searches because his probation officer would be able to search his vehicle and residence if he didn't consent.

When all of the above facts are included in the totality of the circumstances, Torkelsen was in custody of law enforcement officers and was under arrest continually from the time of his illegal stop to the time he gave his consents. Changing officers, removing handcuffs, and feeding Torkelsen weren't intervening circumstance that ended Torkelsen's arrest and purged the taint of an illegal stop.

ISSUE II. Should defendant-appellant, Steven A. Torkelsen's request to represent himself at trial been granted?

Torkelsen believes he was denied his constitution right to represent himself. The right of a Defendant to represent himself are set out in the United States Constitution in the Sixth Amendment and Article 1, Section 12 of the North Dakota Constitution.

Torkelsen believes the following facts show he knowingly, intelligently, voluntarily waived his right to counsel and invoked the right to represent himself.

State v. Torkelsen 2008 ND 141, ¶ 44. Torkelsen made the following statements:

"... I ask that now you do accept his motion to withdraw as counsel. ... And I–I insist that either I alone sit here and be allowed to ask these questions so I'm not tugging on his sleeve and being ignored. ... Now, either he's going to ask him or I– or I'll sit here and ask him. It will take me longer in between questions, but at least I'll– there will be some thought put into each question." (Emphasis added)

From the above it is clear that Torkelsen wanted:

1. The Court to accept his attorney's motion to withdraw.

2. To be allowed to question the witnesses.

3. That he wanted to ask certain questions because he knew his attorney wouldn't ask the questions.

4. That he wanted to represent himself.

CONCLUSION

For the above and forgoing reasons, the Supreme Court should grant Torkelsen's Petition for Rehearing.

Dated this 4th day of September, 2008.

Respectfully submitted:

Benjamin C. Pulkrabek

Benjamin C. Pulkrabek, ID# 02908
Attorney for Appellant
402 First Street NW
Mandan, ND 58554
(701)663-1929

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that I am an employee in the office of Pulkrabek Law Firm and I am a person of such age and discretion as to be competent to serve papers.

That on September 4th, 2008, she served, by mail, a copy of the following:

PETITION FOR REHEARING

by placing a true and correct copy thereof in an envelope and depositing the same, with postage prepaid, in the U.S. mail at Mandan, North Dakota, addressed as follows:

Lonnie Olson
Ramsey County State's Attorney
524 4th Avenue NE, Unit 16
Devils Lake, ND 58301

Lisa B. Gibbens
Towner County State's Attorney
P.O. Box 708
Cando, ND 58324

I further certifies that on September 4th, 2008, I dispatched to the Clerk of the North Dakota Supreme Court, an original and seven copies of the PETITION FOR REHEARING and emailed the same containing the full text of the PETITION.

Jacqueline Haag

Subscribed and sworn to before me on this 4th day of September, 2008.

Benjamin C. Pulkrabek
Notary Public