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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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SUPREME COURT NO.: 20070174

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SEP 14 2007

State of North Dakota,

STATE OF NORTH DAKOTA

Plaintiff-Appellee,

- vs -

Michael Kochel,

Defendant-Appellant.

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APPEAL FROM THE CRIMINAL JUDGMENT  
SOUTHWEST JUDICIAL DISTRICT  
ADAMS COUNTY CASE NO. 01-06-K-00089  
THE HONORABLE ZANE ANDERSON, PRESIDING

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APPELLANT'S BRIEF

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**TABLE OF CONTENTS**

Table of Contents . . . . .	i
Table of Cases, Statutes and Other Authorities . . . . .	ii
Abbreviations . . . . .	iii
Statement of the Issues . . . . .	1
Nature of the Case . . . . .	2
Statement of the Facts . . . . .	4
Scope of Review . . . . .	6
Argument . . . . .	7
Issues Presented:	
I. Did the Trial Court err when it dismissed and denied Mr. Kochel's Suppression Motion? . . . . .	7
Conclusion . . . . .	10

**TABLE OF CASES, STATUTES AND OTHER AUTHORITIES**

**TABLE OF CASES**

<u>State v. Winkler</u> 552 N.W.2d 347 (N.D. 1996)	7
<u>Payton v. New York</u> 445 U.S. 537, 585, 100 SCT. 1371, 63 LEd2, 639	7
<u>State v. Kitchen</u> 1997 N.D. 241. 572 N.W.2d 106	7, 8, 9, 10
<u>Cady v. Dombrowski</u> 413 U.S.433, 439, 93 Sct. 2523, 2527, 37 L.Ed 706, 713 (1973)	7, 8
<u>State v. Dickinson</u> 313 N.W.2d 526, 532, Iowa 1981	8
<u>State v. Merrill</u> 563 N.W.2d 340, 344 (Neb. 1997)	8
<u>State v. Blumber</u> 458 N.W.2d 300 (N.D. 1990)	8

**STATUTES AND OTHER AUTHORITIES**

Fourth Amendment	7
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## ABBREVIATIONS

Page - P.

Line - L.

Transcript - Tr.

Sentencing Transcript - STR.

**STATEMENT OF THE ISSUE**

**ISSUE:** Did the Trial Court err when it dismissed and denied Mr. Kochel's Suppression Motion?

## NATURE OF THE CASE

This case began on November 1, 2006 when Adams County Sheriff Eugene Molpert received a phone call from the Grant County Sheriff's Office requesting he do a "welfare check" at the trailer home of Michael Kochel in Adams County for a Troy Kellogg.

During the "welfare check" of Michael Kochel's trailer home, Sheriff Molpert entered an entry room that had been added on to the trailer and walked to the next door. At that point Sheriff Molpert could see a light bulb on a table he believed to be drug paraphernalia.

Sheriff Molpert went to Dickinson, North Dakota on November 1, 2006 and made an Application and Affidavit for a Search Warrant before District Judge William Herauf.

On November 2, 2006. Sheriff Molpert and other law enforcement officers executed the search warrant on Michael Kochel's home in Adams County.

During the search, methamphetamine, marijuana and drug paraphernalia were found.

Michael Kochel was charged in an Amended Criminal Information with three criminal charges:

Count One: Possession of Methamphetamine, a Class C Felony

Count Two: Possession of Marijuana (less than one-half ounce), a Class B  
Misdemeanor

Count Three: Possession of Drug Paraphernalia (Marijuana), a Class A  
Misdemeanor

A preliminary hearing was held on the 7<sup>th</sup> day of December, 2006, and at the conclusion of that hearing Mr. Kochel was bound over for trial in the District Court on all three charges.

A suppression motion was held on March 20, 2007, to suppress all evidence seized because the initial search of Mr. Kochel's home on November 1, 2007 was done without a search warrant.

The suppression motion was denied and a jury trial was held on May 2, 2007.

At the conclusion of the jury trial, Mr. Kochel was found guilty of all three counts.

After judgment and sentence were pronounced on the 20<sup>th</sup> day of June, 2007, Mr. Kochel timely appealed.

This matter is now before the North Dakota Supreme Court.

## STATEMENT OF THE FACTS

Eugene Molpert is the Sheriff of Adams County, North Dakota. STR. P. 2, L. 13. On November 1, 2006, he got a phone call from the Grant County, North Dakota Sheriff's office requesting that he make a "welfare check" on a Terry Kellogg. STR P.2, L. 24 - 25.

The reason why the Grant County Sheriff's office was concerned about Mr. Kellogg is because on November 1, 2006, he had been in his father farm yard shooting a .22 rifle at Martians and was now no longer at his father's farm. One of the places that the Grant County Sheriff thought Mr. Kochel could have gone was to his friend Michael Kochel's house in Adams County. Therefore, the Grant County Sheriff wanted Adams County Sheriff Molpert to go to Mr. Kochel's house to see if Mr. Kochel was there, and if he was, to see if he was alright. STR. P. 2, L. 25 and P. 3, L. 1 - 7.

Michael Kochel's house in Adams County, North Dakota is a trailer house. With a street address of Route 1, Box 47A, Mott, North Dakota. STR. P. 13, L. 7 - 13. There are three entrances to Mr. Kochel's trailer home. STR. P. 17, L. 10 - 20, P. 18, L. 4 - 8 and P. 19, L. 19 - 21.

When Sheriff Molpert went to conduct the "welfare check" at Mr. Kochel's house he was accompanied by Highway Patrolman Craig Tuhy. When Sheriff Molpert and Trooper Tuhy were driving toward Mr. Kochel's trailer house, they saw an individual walk toward the trailer house and then disappear by another building. STR. P. 3, L. 11 - 25 and P. 4, L. 1. Sheriff Molpert was unable to identify this person, but because of his slender build, Sheriff Molpert didn't think it was Mr. Kochel. STR. P. 4, L. 4 - 7.



Sheriff Molpert then walked toward Mr. Kochel's trailer house and found the screen door to the entry room was open. (See Defendant's Exhibit 1) This entrance to the trailer house has no doorbell so when the public comes to this entrance. they knock. According to Mr. Kochel. the public doesn't enter the entry room, but stay at the entry door. STR. P. 20, L. 20 - 25. and P. 21. L. 1 - 16. Exhibit 1. shows a no hunting or trespassing sign on a post beside the steps going up to the screen door. STR. P.21. L. 14 - 16. This screen entry door is normally locked because in the entry room are clothes, tools and a freezer containing frozen food. STR. P. 23, L. 23 - 25 and P. 24. L. 1 - 2. Also. the screen entry door is kept locked to keep mice out. STR. P. 24, L. 11 - 16.

Sheriff Molpert beat on the screen entry door and hollered, "Is anybody here. is anybody here?" Nobody answered. STR. P. 4, L. 8 - 15. When no one answered, Sheriff Molpert stepped into the entry room and walked to the next door. There he knocked and hollered again and no one answered. STR. P. 4, L. 13 - 15.

While standing at the door going into the trailer home, Sheriff Molpert saw a light bulb on a table. The light bulb had a brown spot on it, the base was removed, and the filament was gone. STR. P. 4. L. 17 - 21. From Sheriff Molpert's training and experience, he believed the light bulb was meth paraphernalia. STR. P. 4, L. 22 - 25 and P. 5, L. 1 - 5.

Sheriff Molpert and Trooper Tuhy then returned to Hettinger where Sheriff Molpert made an application and got a search warrant for Mr. Kochel's trailer home. STR. P.5, L. 11 - 14. This search warrant was able to be obtained because the light bulb Sheriff Molpert saw on the table in Mr. Kochel's trailer house and because of Sheriff

Molpert's knowledge that such a bulb is drug paraphernalia. The search warrant was executed on November 2, 2006. The items found during the search were, a beer can that had been made into a smoking device for drugs, a film container containing stems and seeds of marijuana and a plastic container that contained meth. TR. P. 25, L. 9 - 25, P. 26, L. 1 - 25, and P. 27, L. 1 - 21.

Mr. Kochel, prior to trial made a motion to suppress all evidence seized because Sheriff Molpert had violated his Fourth Amendment rights by entering a part of his residence, the entry room to his trailer home without a warrant on November 1, 2006. The trial judge dismissed and denied Mr. Kochel's Suppression Motion. STR. P. 40, L. 11 - 15, P. 41, L. 1 - 25, P. 42, L. 1 - 25 and P. 43, L. 1 - 17.

Mr. Kochel's trial was held on May 2, 2007. It ended with Mr. Kochel being found guilty on all three counts. TR. P. 87, L. 24 - 25 and P. 88, L. 1 - 5.

From the Judgment and Sentence, Mr. Kochel timely appealed.

### **SCOPE OF REVIEW**

Generally, a trial court's decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the trial court's findings, and if its decision is not contrary to the manifest weight of the evidence. State v. Winkler, 1997 ND 144, ¶8, 567 N.W.2d 330; City of Fargo v. Thompson, 520 N.W.2d 578, 581 (N.D. 1994). After reviewing the record, we determine the trial court's factual findings are not against the manifest weight of the evidence.

[¶12] Whether findings of fact meet a legal standard is a question of law. Ova, 539 N.W.2d at 858. While we do not conduct a de novo review of the findings of fact,

questions of law are fully reviewable.

## ARGUMENT

### **ISSUE I. Did the Trial Court err when it dismissed and denied Mr. Kochel's Suppression Motion?**

According to *State v. Winkler*, 552 N.W.2d 347 (N.D. 1996), when an individual possesses a reasonable expectation of privacy in a given area, the government must obtain a warrant before searching that area subject to a few specially established and well-delineated exception.

The following language in *Payton v. New York*, 445 U.S. 537, 585, 100 SCT. 1371, 63 L.Ed2, 639 defines the area protected inside the home:

The Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances that threshold may not be reasonably crossed without a warrant.

The above language in *Payton* raises the questions in the case before the Court (hereafter "the case") about where the line for the threshold should be drawn. Should it be at the door to Mr. Kochel's entry room or should it be at the door to his trailer inside the entry room?

The procedure to be used in determining where the threshold to Mr. Kochel's trailer house is located is set out in *State v. Kitchen*, 1997 N.D. 241, 572 N.W.2d 106 "we must first look at the reasonableness of each situation, giving due consideration to the particular characteristics of the home in question." The manner in which reasonableness is to be interpreted is found in the Fourth Amendment "*Cady v. Dombrowski*, 413 U.S.

433, 439, 93 Sct. 2523, 2527, 37 L.Ed 2d 706, 713 (1973).”

In assessing the reasonableness of Mr. Kochel’s expectation of privacy according to *Kitchen, surpa*. “. . . We first consider why law enforcement approached the door.” “. . . When officers` knock on a door where visitors logically would knock, while engaged in legitimate police activities, they have no less right to be there than any member calling at that time.” *State v. Dickinson*, 313 N.W.2d 526, 532, Iowa 1981; see also, *State v. Merrill*, 563 N.W.2d 340, 344 (Neb. 1997) (concluding a police officer should not be precluded from observing as an officer what would be observable to him as a private citizen).

Therefore, because of the above, the first thing to consider is the reason why Sheriff Molpert approached the entry door to Mr. Kochel’s trailer? Sheriff Molpert’s testimony shows the reason was because he had received a phone call from the Grant County Sheriff’s Office asking him to do a “welfare check” in Adams County at the home of Mr. Kochel for an individual named Troy Kellogg. The Grant County Sheriff’s Office believed a “welfare check” at Mr. Kochel’s trailer house was necessary for Mr. Kellogg. The reason why, was that Mr. Kellogg had been shooting Martians in his parent’s yard with a .22 rifle, had left his parent`s farm, and might have gone to Mr. Kochel’s farm.

A “welfare check” does not involve the serving of any criminal or civil papers but, involves civil legal business. According to footnote 3 in *State v. Blumler*, 458 N.W.2d 300 (N.D. 1990) “civil legal papers are not the equivalent of search warrant, and we do not believe that the service of such papers gives the officer serving them carte blanche entry to an area of a person’s residence.” Therefore, it would appear that the same

limitations on civil legal papers would apply to a “welfare check”.

The above factual situation as to why Sheriff Molpert went to Mr. Kochel’s trailer home is different from the facts in Kitchen where the police officers went to Kitchen’s home on criminal business the service of an arrest warrant.

In the case, Sheriff Molpert, after he reached the entry door of Mr. Kochel’s trailer home, knocked and called out. When no one answered, he decided to go through the entry door and walk to the next door where he again knocked and called out. From where Sheriff Molpert was standing in front of the second door, he was able to see a light bulb on a table that from his training he believed was drug paraphernalia.

When Sheriff Molpert entered the entry:

1. Exhibit 1 shows a no hunting or trespassing sign was on a post beside the steps next to the entry door.
2. There was a food freezer in the entry room.
3. There were clothes in the entry room.
4. There were tools kept in the entry room.

The above items kept in Mr. Kochel’s entry room and the no hunting or trespassing sign makes Mr. Kochel’s entry different from Kitchen, because Kitchen’s hallway has nothing in it to indicate anyone used the hall for anything more than an entry to the home.

In the case, Mr. Kochel testified that when people used the entry door they knocked and if no one answered they don’t go into the entry way.

Sheriff Molpert in his affidavit of January 12, 2007 said at 6, “The entry way door

appeared to be the door the public should use.” His affidavit makes no statement about what the public does after they knock because he had never seen anyone from the public knock on the entry door.

The above testimony about the public’s use of Mr. Kochel’s entry door is different from Kitchen. The testimony in Kitchen was given by the current tenant and Becky Kitchen. The current tenant testified that visitors often don’t use the door or the doorbell and instead enter the hall and knock on the interior door. Becky Kitchen testified that she expected visitors to ring the door bell and wait outside the house, however, she admitted she considered the entryway a conduct to and from the main door.

### CONCLUSION

The reason Sheriff Molpert knocked on Mr. Kochel’s entry door was because he was making a “welfare check”. This “welfare check” was civil in nature and was made to find out if Troy Kellogg was at Michael Kochel’s trailer house.

While Sheriff Molpert was engaged in this “welfare check”, he has as much right to be at and knock on the entry door of the entry way to Mr. Kochel’s trailer home as any other member of the public.

When a member of the general public goes to Mr. Kochel’s entry door, he or she knocks, but, goes no further into the trailer home.

There was a no hunting or trespassing sign (Exhibit 1) on a post at the top of the stairs outside the entry door.

This no hunting or trespassing sign was to keep the general public and law enforcement officials off of Mr. Kochel’s property and out of his entry room.

The threshold to Mr. Kochel's home is the entry door.

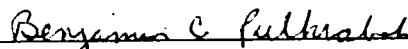
The drug paraphernalia that Sheriff Molpert saw after he entered the entry room, could not have been seen if he hadn't entered the entry room and looked through the second door into Mr. Kochel's trailer house.

Sheriff Molpert had no search warrant when he went into the entry room.

Mr. Kochel has a reasonable expectation of privacy against warrant searches in the entry room to his trailer.

All evidence seized as a result of this warrantless search must be suppressed.

DATED at Mandan, North Dakota, this 14 day of September, 2007.

  
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