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20070174

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, v. Michael Kochel, Defendant and Appellant.	)	Supreme Court No. 20070174 Adams County No. 06K-0089

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STATE OF NORTH DAKOTA

BRIEF OF APPELLEE

Appeal from District Court
Adams County, North Dakota
The Honorable Zane Anderson

Appeal from Criminal Judgment dated June 20, 2007

Elton R. Anson
Adams County Assistant State's Attorney
P. O. Box 390
Hettinger, North Dakota 58639
(701) 567-2418
N.D. Bar Board ID No. 05755

Attorney for Plaintiff and Appellee

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[¶ 1] TABLE OF AUTHORITIES

Statutes

None

Other Authority

None

STATEMENT OF ISSUE

[¶ 2] Did the Trial Court err when it dismissed and denied Mr. Kochel's Suppression Motion?

STATEMENT OF THE CASE

[¶ 3] The State accepts the nature of the case presented in the Brief of the Defendant/Appellant, except for the part wherein an initial search of Michael Kochel's trailer house was performed on November 1, 2006 without a search warrant. There was no search of Mr. Kochel's trailer home on November 1, 2006. There was only a "welfare check" where law enforcement officers entered the unlocked partially open outer entryway door to the trailer house to knock on the trailer home entrance door to see if anyone was at home. The jury found the Defendant guilty on all three counts.

STATEMENT OF THE FACTS

[¶ 4] On November 1, 2007, Adams County Sheriff Eugene Molbert received a call from Grant County Deputy Sheriff Darwin Roth requesting that the Sheriff do a welfare check on Troy Kellogg,who was thought to be at Michael Kochel's residence in Adams County. The welfare check was being requested on behalf of Bernard Dietz, stepfather of Troy Kellogg because Mr. Dietz he was worried that Troy Kellogg might hurt himself or others as he had seen Troy shooting at "Martians" with a .22 caliber weapon. Mr. Dietz believed his stepson to be at Michael Kochel's residence.

[¶ 5] Sheriff Molbert and North Dakota State Highway Patrol Trooper Craig Tuhy traveled to Michael Kochel's residence. Upon approaching the Kochel residence, they saw unidentified male in the yard near the trailer house, who walked out of sight behind a

building when he saw them approaching, and appeared to walk towards the front entrance of the trailer house.

[¶ 6] The officers parked in front of the trailer house next to a pickup known to be owned by Michael Kochel, and walked down the worn path to the door of the entryway, which was halfway open. Sheriff Molbert knocked on the door frame, while shouting, "Is anyone home?" After knocking and calling out several times and receiving no response, Sheriff Molbert entered the open door into the entryway and proceed to the inner main door to the trailer house.

[¶ 7] The outer entryway door was a screen/storm door. The entryway was not a living area and consisted mainly of storage cupboards, shelves, and articles of outer clothing. It was approximately ten to twelve feet between the entryway door and the inner main door. Sheriff Molbert could see the inner main door to the trailer house, which appeared to be the door that the public would use to enter the trailer house.

[¶ 8] The inner main door to the trailer house was fully open, was the original main threshold door, and was flush with the original exterior wall to the trailer house.

[¶ 9] After walking to the main threshold door of the trailer, Sheriff Molbert again knocked and shouted, "Is anyone home?" He still received no response. While standing at the open doorway, Sheriff Molbert noticed a light bulb with the base removed and a dark residue on the light bulb. The light bulb was lying on a table with matches beside the light bulb. The light bulb and matches were in open plain view from the entryway. Sheriff Molbert never entered the trailer house.

[¶ 10] When no one responded, Sheriff Molbert left the entryway and looked behind

the trailer house for Troy Kellogg. He found Troy Kellogg's pickup in the trees behind the trailer house. Sheriff Mobert and Trooper Tuhy then left the premises." (Affidavit Of Eugene Molbert. Appendix Pages 37, 38, and 39. See also Transcript Of Motion To Suppress Hearing, Eugene Molbert Testimony. Appendix Pages 94 through 103.)

SCOPE OF REVIEW

[¶11] When reviewing a District Court's denial of a motion to suppress, the Supreme Court defers to the District Court's findings of facts. ***State v. Anderson***, 2006 ND 44, 710 NW2d 293; citing ***State v. Kitchen***, 1997 ND 241, P11, 572 NW2d 106.

> "We resolve conflicts in testimony in favor of affirmance, because we recognize the district court is in a better position to assess the credibility of witnesses and with the evidence. *Id.* '[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.' *Id.* Although we defer to the district court's findings of fact, questions of law are fully reviewable. ***State v. Linghor***, 2004 ND 224, P3, 690 NW2d 201."

LAW AND ARGUMENT

[¶ 12] The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. The US Supreme Court has stated that the essential purpose of the proscriptions of the Fourth Amendment "is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents in order to safeguard the privacy and security of individuals against arbitrary invasion..." ***Delaware v. Prouse***, 440 US 648, 653-54, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660,667 (1979).

[¶13] Under this rule, the government must obtain a search warrant prior to

unreasonably searching or entering an area where a person possesses a reasonable expectation of privacy, subject to certain well-established exceptions. See ***State v. Kitchen***, 1997 ND 241, 572 NW2d 106, 108. These exceptions include searches based on consent, plain view, exigent circumstances, and searches incident to arrest.

[¶14] ***State v. Kitchen*** was summarized in an Iowa case, ***State v. Breuer***, 577 NW2d 41 (1998) as follows:

> "...police officers approached an outer door of a home and rang the doorbell to serve a warrant. The officers could hear loud music playing inside the residence, but no one answered the doorbell. The officers then entered an enclosed entryway and knocked on a second door leading into the living area of the homes. One of the defendants opened the inner door and met the officers in the entryway. The officers spoke to the defendant a few minutes until that defendant went back into the residence to get another person with whom the officers wanted to speak. As the defendant opened the inner door to step back into the residence, the officers smelled an odor or marijuana coming from inside the residence. The officers eventually entered the residence and secured the premises until a search warrant was obtained. Officers searched the residence and seized marijuana and drug paraphernalia.
>
> Defendants argued that the marijuana should be suppressed because they had an expectation of privacy in the entryway to their home and thus the officers' warrantless entry into that part of their home was an illegal search under the Fourth Amendment. *See 572 NW2d at 108.*
>
> The North Dakota Supreme Court held that defendants did not have a legitimate expectation of privacy in the entryway to their home, and even if they did, it was not unreasonable for the officers to step into the entryway to knock at the inner door. First, the court noted that police officers may enter certain areas around a home where a person may have a reasonable expectation of privacy, when the officers are conducting legitimate business. *Id. at 109.* Second, the court noted that the officers waited a reasonable time after ringing the doorbell and that the loud music playing inside the home might have prevented the occupants from hearing the doorbell. *Id. at 111.* Additionally, the court noted that even though defendants did not subjectively expect visitors to enter the outer door and walk into the entryway, the court noted that the door to the entryway was unlocked and thus "was impliedly open to at lease some access by the public". *Id. at 112.*"

[¶15] The United States Supreme Court has noted that an entry without a warrant may be reasonable under the Fourth Amendment when there are diminished expectations of privacy or minimal intrusions by police officers. ***Illinois v. McArthur***, 521 U.S. 325, 121 S.Ct. 946 (2001).

[¶16] ***State v. Kitchen*** is also cited in the case of ***People v. Tierney***. 266 Mich.App. 687. 703 NW2d 204 (Mich. 2005). There, the Court considered an instance of state troopers entering an enclosed porch without a warrant. stating that the issue was whether the defendant had an objectively reasonable expectation of privacy in the enclosed porch, and if so, whether defendant's Fourth Amendment rights were violated. *Id. at 697.* The Michigan Court stated as follows:

> "There is no published case law in Michigan directly on point. However. courts in several of our sister states have considered this question under similar circumstances and have held that no reasonable expectation of privacy exists in an enclosed or screened-in porch. In determining whether a reasonable expectation of privacy exists, those cases have largely focused on whether the porch was part of the living area of the home. Moreover, these courts have recognized the reasonableness of police officers' entries into such porches in order to communicate with any possible occupant.
>
> The Illinois Court of Appeals has issued several noteworthy opinions on this issue. For example, in ***People v. Arias***, 179 Ill.App.3d 890; 535 N.E.2d 89. 128 Ill. Dec. 875 (1989), the police officers approached a private residence to contact a suspect. *Id. at 892.* The officers entered an enclosed. unlocked porch to reach the front door of the residence, one of two apartments in the building. *Id. at 893.* The court concluded that the officers did not violate the defendant's Fourth Amendment rights when they entered the enclosed porch. finding that there was no reasonable expectation of privacy in the enclosed porch. *Id. at 896.* In reaching this conclusion, the court relied on prior cases that focused on the concept of a living space or 'home' as a basis for determining whether a reasonable expectation of privacy existed. *Id. at 895-896.* Detracting from a possible conclusion that there was a reasonable expectation of privacy were the facts that neither the defendant nor anyone in the defendant's family dwelled on the porch with the intent to remain there indefinitely, the porch was functionally and structurally different from the rest

of the home, the porch was a storage place, the porch was surrounded by windows (with a screen-door entry and with a heavy wooden door between the porch and the homes itself), the windows between the home and the porch were covered by shades, there was no doorbell outside the porch door and the porch door was not locked. *Id at 895.*

Likewise, in ***People v. Greene***, 289 Ill.App. 3d 796; 682 N.D.2d 354, 224 Ill.Dec. 793 (1997), the court concluded that police officers did not violate the defendant's Fourth Amendment rights when they entered a screened-in porch and knocked on an inner door. In that case, the officers approached a private residence to investigate a 911 hang-up call received from that residence. *Id. at 800.* In making its findings, the court noted that there was neither any furniture not any other object on the front porch, the inner door to the home itself was closed, and the porch was entered through a screen door that was unlocked. *Id.* The court found that the defendant had a lesser expectation of privacy in his porch than in his residence proper. *Id. at 802.*

In ***State v. Edgeberg***, 188 Wis.2d 339; 524 N.W.2d 911 (1994), the Wisconsin Supreme Court held that the defendant had no reasonable expectation of privacy in a porch or vestibule-type addition to a residence. In that case, police officers approached a private residence to investigate a barking dog complaint. *Id. at 341.* They approached and entered an enclosed, unlocked porch or vestibule-like addition to the home, which appeared to be the main entrance to the house. *Id. at 342-343.* In holding that the defendant had no reasonable expectation of privacy in the porch, the court noted that the porch had an unlocked screen door, a wooden door with windows between the porch and the living areas of the house, no doorbells at either door, and that the porch contained a washer and dryer and work clothes. *Id. at 343.* The court concuded that although the porch may have been used as a laundry area, it also was used as an entryway. *Id. at 346.* The court further noted that that it was a community practice to enter the porch to knock on the inner door. *Id. at 346-347.* See also, ***State v. Edwards***, 36 SW3d 22, 27 (Mo App, 2000); ***State v. Prudhomme***, 287 N.W.2d 386, 389 (Minn. 1979, and ***Kitchen, supra.***

Several other courts have not only focused upon the contents and characteristics of the porch, but also on the police officers' actions and reasons for entering the porch. For example, in ***Commonweath v. McDonnell***, 512 Pa 172; 516 A.2d 329 (1986), the Pennsylvania Supreme Court upheld against a Fourth Amendment challenge the officers' entry into an unoccupied porch to knock on the interior door of the porch. In doing so, the court highlighted the reasonableness under the circumstances of the officers' entering the porch to gain the occupant's attention:

'We find nothing in this record which indicates that their action was unreasonable. Trooper Helwig testified that he did not believe that the occupants of the house could hear a knock at the porch door; he could see that the porch was not occupied, and was used for storage. Therefore, he and the other police officers entered the porch and knocked on the door to the house proper. No search was conducted on the porch after they entered. After identifying himself, Trooper Helwig explained his purpose and appellee allowed the officers to enter the house. These facts show that the officers' sole intention in following this course of action was to effectively comply with the 'knock and announce' rule. Under the circumstances, we find that this was constitutionally reasonable conduct. *Id. at 177.*

The ***Arias*** court arrived at the some conclusion:

'[Police officers] entered the porch merely to knock on the door of the house – to make their presence known. The officers' actions are not proscribed under the fourth amendment: on the contrary, their actions are encouraged by the requirement that officers knock on the suspect's door and announce their presence. ***People v. Marinez,*** 160 Ill.App.3d 349; 353; 513 N.E.2d 607, 610, 112 Ill.Dec. 193 (1987). Their entry of the porch to know on the interior door was no more intrusive than that of a man delivering packages, 'a boy collecting for the newspaper or a little girl selling girl scout cookies.' ***People v. Jones***, 622; 119 Ill.App.3d 615; 456 N.E.2d 926, 933, 75 Ill.Dec. 105 (1983). Other State supreme courts have held that the entry by police officers of an enclosed back porch in order to knock on an interior door did not violate the principles of reasonableness imposed upon those conducting government searches and seizures. ***Arias, supra*** at 896."

[¶17] As in ***State v. Kitchen,*** this defendant did not have a legitimate expectation of privacy in the entryway to the trailer house, and even if he did, it was not unreasonable for the officer to step into the entryway to knock on the inner door. There was no intention or attempt to conduct a search, instead, the sheriff merely attempted to gain the attention of any occupants in the home.

CONCLUSIONS

[¶18] Sheriff Molbert drove to the Kochel residence to do a welfare check, saw an unidentified person and had reason to believe that person might be in the trailer house.

[¶19] Sheriff Molbert knocked at the open entry door, shouted and, as is reasonable to expect, stepped into the entry and knocked on the inner open door, which was the threshold to the residence. He did not cross the threshold into the trailer house.

[¶20] Sherriff Molbert did not enter the entryway to conduct a search, but with the purpose of doing a welfare check and to contact the person he thought may have entered the trailer house. He can certainly keep his eyes open and view what he views. He saw the lightbulb and later obtained a search warrant for the property.

[¶21] A reasonable person would view the entry attached to the trailer house as an entryway and that it would be the main entry to the trailer house. It is not unreasonable to think that if someone came to the property looking for someone, they would enter the open entryway door to knock on the inner trailer house door.

[¶22] The State respectfully asks that the District Court's decision denying Defendant's Motion to Suppress be summarily affirmed.

Dated this 6th day of November, 2007.

Elton R. Anson, #05755
Adams County Assistant States Attorney
P. O. Box 390
Hettinger, North Dakota 58639
(701) 567-2418

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	)	
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	)	
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CERTIFICATE OF SERVICE

I hereby certify that the BRIEF OF APPELLEE herein was on November 2, 2007 electronically transmitted to the following:

Clerk, North Dakota Supreme Court
supclerkofcourt@ndscourts.com

Benjamin Pulkrabek - Attorney for Defendant and Appellant
pulkrabek@lawyer.com

Dated this 6th day of November, 2007.

Eltcn R. Anson
Adams County Assistant State's Attorney