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STATE OF NORTH DAKOTA

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

SUPREME COURT NO. 20100358

State of North Dakota

Petitioner-Appellant,

-vs-

Karleen Ann Peterson,

Respondent-Appellee.

APPEAL FROM THE MOTION TO SUPPRESS
FROM THE DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
WARD COUNTY CR. NO. 51-10-K-1042
THE HONORABLE WILLIAM W. MCLEES, PRESIDING

BRIEF

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ABBREVIATIONS

App. - Appendix

p. - Page

pp. - Pages

ISSUE

[¶1] Did Defendant/Appellee Karleen Ann Peterson consent to having her purse searched by a law enforcement officer when she chose to voluntarily reside with and share a bedroom with Tucker Payne while he was on supervised probation?

NATURE OF THE CASE

[¶2] This is an appeal by the State of North Dakota after the trial court suppressed evidence in a probationary search of Defendant/Appellee Karleen Ann Peterson's purse because the search was unreasonable and violated her rights under the Fourth Amendment to the United States Constitution and Article 1 §8 of the North Dakota Constitution.

STATEMENT OF FACTS

[¶3] Tucker Payne was on supervised probation and part of the supervised probation involved a search provision. Defendant/Appellee Karleen Ann Peterson chose to voluntarily reside with and share a bedroom with Mr. Payne. App. pp. 4 & 5.

[¶4] On April 7, 2010 Ward County Narcotics Task Force agent, Levi Lockren along with North Dakota Parole and Probation Officers Mike Nelson and Jordan Thompson conducted a compliance check of the residence of probationer Tucker Payne. App. p. 4.

[¶5] At the time of the probationary search Defendant/Appellee Karleen Ann Peterson was living with and shared a bedroom with Mr. Payne. App. 5. During the search a purse belonging to Peterson was found in the bedroom. App. 5. Agent Lockren proceeded to search the purse and found a metal smoking device with burned marijuana residue, a metal mushroom with marijuana residue and a piece of note book

paper with a lump of marijuana resin. App. 5.

[¶6] There is nothing in the record to indicate that Ms. Peterson and Mr. Payne had mutual use of Ms. Peterson's purse, or joint access to or control of the same. App. 10. There is no contention that Ms. Peterson's purse was an item exclusively used by Mr. Payne. App. 10. Ms. Peterson in this case had a diminished expectation of privacy by taking up residence with probationer Payne who was subject to a search clause but, she did not give up all rights to privacy. Therefore law enforcement officers cannot simply rifle through her personal effects without any regard to the protection provided for in the Fourth Amendment to the United States Constitution and Article 1 §8 of the North Dakota Constitution.

LAW AND ARGUMENT

[¶7] According to *State v. Adams*, 2010 ND 184, 788 NW2d 619 [¶7] When reviewing a district court's decision on a suppression motion, we apply a deferential standard of review and defer to the district court's findings of fact. *State v. Olson*, 2007 ND40, ¶7, 729 N.W.2d 132. Conflicts in testimony are resolved in favor of affirmance, because the district court is in a superior position to assess credibility of witnesses and to weigh the evidence. *City of Fargo v. Thompson*, 520 N.W.2d 578, 581 (N.D. 1994). Generally, a district court's decision to deny a suppression motion will not be reversed if there is sufficient competent evidence capable of supporting the district court's findings and if its decision is not contrary to the manifest weight of the evidence. *Id.* Questions of law are fully reviewable on appeal. *Olson*, 2007 ND40, ¶7, 729 N.W.2d 132.

[¶8] The state in Appellants Brief page 5, paragraph 1 cites *State v. Driscoll*

2005 ND 105, 697 NW2d 351 Driscoll and the case now before the court both involve illegal drug activity and the searching of Defendant's purses. Since the search of the purse in Driscoll was upheld the State claims that the search of the purse in the case now before the court should also be upheld. The problem with the State's claim is that Driscoll involved a search warrant that was obtained by and executed by the police, while the case now before the court (case), the search was possible because it was made according to the terms of Tucker Payne's supervised probation. Therefore the search in case the search was limited to the language contained in the conditions of supervised probation which is:

18. The Defendant will submit his/her person, place of residence or vehicle, or any other property to which the Defendant has access, to search and seizure, at any time of the day or night, with or without a search warrant, by: (a) any parole or probation officer; (b) any law enforcement officer at the direction of a parole or probation officer; or, (c) any law enforcement officer with a reasonable suspicion of criminal conduct.

[¶9] In the case the trial judge found:

“There is nothing to indicate that Peterson and Payne had mutual use of Peterson' purse or joint access to the same. Not unexpectedly no contention has been made that Peterson's purse was an item used exclusively by Payne” App. 10.

[¶10] Just because she decided to take up residence with probationer, Peterson did not assume the risk that Payne could give consent for law enforcement to search her personal possession such as her purse.

[¶11] In this case the State didn't request any oral testimony to be taken and let the suppression motion be decided on briefs without any affidavits. Therefore the only fact before the trial judge regarding ownership of the purse is that Peterson said the purse belonged to her. App. 5.

[¶12] The State also relies on *State vs. Adams*, 2010 ND 184, 788 NW2d 619 as a reason to uphold the probationers search of Peterson’s purse. *Adams* involved a probation search of a safe located in a common area and the stipulated facts did not indicate who the safe belonged to at the time of the search. In this case Ms. Peterson said at the time of the search the purse was hers. The trial judge in the case has found that the record before him doesn’t establish that Mr. Payne had mutual use of the purse with no problem or joint access to the same. Also the court found that there was no contention that purse was an item used exclusively by Payne. Because of the above trial courts findings a reasonable officer could not believe that Mr. Payne had any access to Ms. Peterson’s purse. Therefore the difference in the facts in *Adams* the case is:

1. The type of search warrant involved in each case;
2. That in *Adams* no law officer knew who owed the safe and in the case the law officers knew the purse belonged to Ms. Peterson;

[¶13] The State also relies on *State vs. Hurt*, 2007 ND 192, 743 NW2d 102 as a reason to uphold the search of Ms. Peterson’s purse. *Hurt* upheld a consent search of a common area. The court in the case said:

The Court finds that Peterson’s purse is not an area in which she could expect to enjoy a diminished expectation of privacy, and that merely by choosing to live with Payne and share a bedroom with him does not translate into consent for a warrantless search of her purse. “The government has the burden of proving the effectiveness of a third party’s consent.” *United States v. Salinas-Cano*, 959 F.2d 861, 964 (10th Cir. 1992) (citing *Illinois v. Rodriguez*, 497 U.S. 177, 110

S.Ct. 2793, 2797, 111 L.Ed.2d 148 (1990); *United States v. McAlpine*, 919 F.2d 1461, 1463 (10th Cir. 1990)). “The government must therefore come forward with persuasive evidence of both shared use *and* joint access or control of a container in order to support third party consent.” *Salinas-Cano* at 964 (citing *United States v. Matlock*, 415 U.S. 164, 171 N. 7, 94 S.Ct. 988, 993 N. 7, 39 L.Ed.2d 242 (1974)). The mutual use of property by those having shared or joint access to it is what supports the third party consent.

Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, see *Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961) (landlord could not validly consent to the search of a house he had rented to another), *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) (night hotel clerk could not validly consent to search of customer’s room) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Matlock, 415 U.S. at 171 n. 7 (emphasis added). See also *United States v.*

Karo, 468 U.S. 705, 725, 104 S.Ct. 3296 (1994) (“A privacy interest in a home itself need not be coextensive with a privacy interest in the contents or movements of everything situated inside the home. This has been recognized in connection with third-party consent to searches. ... Consent to search a container ... is effective only when given by one with ‘common authority’ over ... [the] effects sought to be inspected.”)

[¶14] Ms. Peterson had a privacy interest in the purse in this case. Mr. Payne’s probationary search was limited to things he had common authority over and since he

had no authority over Ms. Peterson's purse he couldn't consent to a search of that purse.

CONCLUSION

[¶15] In this case the District Court's decision was to suppress the evidence. In North Dakota, a district court's decision to deny a suppression motion will not be reversed if there is sufficient competent evidence capable of supporting the district court's findings and its decision is not contrary to the manifest weight of the evidence. The above language should also apply when District Court judge grants a suppression motion.

[¶16] In this case the evidence established that Ms. Peterson owned the purse and had a privacy interest in the purse. The evidence didn't establish that Mr. Payne had a mutual use of Ms. Peterson's purse or joint access to the purse and there was no contention the purse was used exclusively by Mr. Payne. Therefore Mr. Payne could not consent to the search of Ms. Peterson's purse.

[¶17] The State didn't ask for an evidentiary hearing and there are no facts to dispute the trial court's evidentiary rulings. Therefore there is no reason to reverse the trial judge's decision to grant the suppression motion.

DATED this 30th day of December, 2010.

/s/

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing documents were served electronically on the following individual on this 30th day of December, 2010.

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