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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

OF THE STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court No. 20100380
Plaintiff/Appellee,	)	
	)	
v.	)	
	)	Williams Co. No. 07-K-0980
Donald Beane,	)	
	)	
Defendant/Appellant,	)	

APPEAL FROM THE ORDER DENYING MOTION TO SUPPRESS DATED MAY 24, 2010 AND THE CRIMINAL JUDGMENT ENTERED BY THE DISTRICT COURT FOR THE NORTHWEST JUDICIAL DISTRICT THE HONORABLE GERALD RUSTAD PRESIDING ON NOVEMBER 17, 2010

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

[¶1] Whether the district court erroneously denied Donald Beane's Motion in Limine to suppress evidence.

STATEMENT OF THE CASE

[¶2] This is an appeal, after a conditional plea of guilty, by Donald Beane ("Beane") from the District Court denial of Beane's Motion in Limine to suppress evidence dated May 24, 2010 (Appendix ("A") 2, Docket ("D") 85, A. 28) and subsequent criminal judgment issued by the Honorable Gerald Rustad of the Northwest Judicial District filed November 17, 2010. (A. 2, D. 100, A. 30-35).

[¶3] Beane filed a Rule 3.2, N.D.R.CT. Motion in Limine and Brief in Support on May 20, 2010. (A. 2, D. 82, A. 4-25). The State's Response to Defendant's Motion in Limine was also filed May 20, 2010. (A. 2, D. 84, A. 26-27). The District Court filed its Order Re Defense Motion in Limine of 5/18/1 Re Admission of Evidence from Search on May 24, 2010 which denied Beane's Motion in Limine. (A. 2, D. 85, A. 28). Beane entered a conditional plea of guilty to the charge of possession of drug paraphernalia, a class C felony. (Change of Plea and Sentencing Transcript ("CoPT") p. 4, l. 10-16). Beane was sentenced to five years with the Department of Corrections, three years suspended for three years from date of release, credit for 83 days served, sentence to run concurrent with court file no. 2007-K-914 and 915. (Id. p. 3, l. 18-24) and judgment was entered November 17, 2010. (A. 2, D. 100). Beane filed a Notice of Appeal on November 19, 2010. (A. 3, D. 104, A. 29). An attorney was assigned to represent Beane on his appeal.

STATEMENT OF THE FACTS

[¶4] The underlying facts of this case are more fully set out in State of North Dakota v. Donald Beane, 2009 ND 146, 770 N.W.2d 283.

[¶5] On September 3, 2007, probation officers received an anonymous tip that Tanner Wold ("Wold") was at Beane's residence in Williston and the officers, without a warrant, went to the residence seeking Wold. The officers met and Beane on his property and questioned him at which time Beane responded that he did not know Wold or where he was. The officers noticed that Beane had a knife in a sheath which was visible in his pocket.

[¶6] The officers alleged that Beane made a stepping back action which they interpreted as a first step toward taking out his folding knife. Beane was taken to the ground, handcuffed, and a Terry search was done for officer safety. In the course of the search, drug paraphernalia with possible methamphetamine residue on it and a plastic bag of suspected methamphetamine was found in Beane's pockets. Beane was arrested and charged with class C felony possession of drug paraphernalia and class C felony possession of controlled substance.

[¶7] On September 24, 2007, three weeks after Beane was released on bond, his home was searched as a condition of bond. This search resulted in three additional charges which included a class C felony possession of drug paraphernalia and two class A misdemeanor possession of drug paraphernalia.

[¶8] Beane moved to suppress the evidence discovered during the two searches. (Transcript on Motion to Suppress Evidence ("T" dated August 27, 2008). The district

court suppressed the evidence found in the search conducted September 3, 2007 holding that the officers were over-reaching based on a search not justified by officer safety or reasonable suspicion. The district court did not suppress the evidence found in the search conducted September 24, 2007, holding that the evidence was discovered during a search based upon a lawful bond condition, and was not fruit of the poisonous tree.

[¶9] The State appealed arguing the district court erred in suppressing the evidence of the September 3, 1007 search of Beane's person. The Supreme Court issued a decision, filed July 21, 2009, reversing the ruling of the district court suppressing evidence from the September 3, 2007 search. State of North Dakota v. Donald Beane, 2009 ND 146, 770 N.W.2d 283. A Petition for Rehearing filed by Beane on March 5, 2010 was denied by the Supreme Court.

[¶10] Beane filed a Motion in Limine on May 20, 2010 requesting the district court not admit or consider evidence resulting from the search of Beane by probation and parole officers on September 3, 2007 or from the bond search of his residence on September 24, 2007. (A. 2, D. 82, A. 4-25). The State's Response to Defendant's Motion in Limine was also filed May 20, 2010. (A. 2, D. 84, A. 26-27). The District Court filed its Order Re Defense Motion in Limine of 5/18/1 Re Admission of Evidence from Search on May 24, 2010 which denied Beane's Motion in Limine holding that "[T]his matter has been decided by the North Dakota Supreme Court (State v. Beane, 2009 ND 146). (A. 2, D. 85, A. 28).

[¶11] After his motion to suppress was denied, Beane entered a conditional guilty plea on November 17, 2010. (CoPT p. 4, l. 10-16). At the change of plea and sentencing

hearing it was determined that the denial of the suppression motion dated November 12, 2008 was what Beane sought to retain the right to appeal (CoPT p. 6, l. 23-25) and that "the suppression issue would be whether a search provision in a bond can be utilized for anything other than revoking bond". (CoPT p. 7, l. 6-10). Beane's attorney noted "that could be one issue". (Id. l. 10). After taking the conditional plea, the district court did not modify the judgment. (Id. l. 21-22). Beane timely filed his Notice of Appeal (A. 3, D. 104, A. 29) and an attorney was appointed to represent Beane on his appeal.

JURISDICTIONAL STATEMENT

[¶12] The district court had jurisdiction over this case pursuant to N.D. Const. Art. VI, Sect. 8, N.D.C.C. Sect. 27-05-06(1). This Court has jurisdiction over this appeal under N.D. Const. art. VI, Sect.6, N.D.C.C. Sect. 29-28-06(2). This appeal is timely under N.D.R.App.P. 4(b)(1)(A). Regarding the standard of review, this Court accords deference to the factual findings of the trial court when reviewing the denial of a motion to suppress. State v. Keilen, 2002 ND 133, 10, 649 N.W.2d 224 (quoting State v. Huffman, 542 N.W.2d 718, 720 (N.D. 1996)). However, the trial court's legal conclusions are fully reviewable. Id. Questions of law are reviewable de novo. State v. Kitchen, 1997 ND 241, ¶12, 572 N.W. 2d 106.

LAW & ARGUMENT

[¶13] The District Court erroneously denied Beane's motion in limine to suppress finding that "the matter had been decided by the North Dakota Supreme Court (State v. Beane, 2009 ND 146).

[¶14] In the case at hand, Beane maintains that this second search of September 24, 2010 should be found illegal as a fruit of the poisonous tree and that the results of the bond search can only be used for the purpose of revoking his bond.

[¶15] The Supreme Court of North Dakota upheld a trial court order suppressing evidence under circumstances in which law enforcement officers walked into a home, without invitation, to serve process at a time when there was no one home. After observing apparently stolen property, the officers sought and received a search warrant for the items seen and in executing the warrant, the officers observed drugs and obtained an additional warrant. State v. Blumler, 458 N.W.2d 300 (N.D. 1990). The court suppressed the evidence holding that the officers had made two warrantless searches in the home prior to obtaining the first warrant, and notwithstanding that the warrant was valid on its face, all evidence seized would be suppressed as fruit of the poisonous tree. Id. Beane maintains his argument that the initial search of his person on September 3, 2007 was an illegal search due to the fact that he was on his property, had done nothing illegal, that the pat down search exceeded the scope as there was noting in his pockets which would have given law enforcement officers a reasonable belief that he was inpossession of additional weapons and therefore officer safety was not in question. Although the bond, and search provision, was valid on its face it was the result of an initial illegal search and therefore evidence seized in the bond search was fruit of the poisonous tree.

[¶16] Other courts have reached the same conclusion under similar circumstances. In Segura v. United States, 468 U.S. 796 (1984), narcotics officers had arrested individuals

for possession of drugs. These individuals identified their supplier and the government agents were advised they could arrest the supplier. One individual was arrested and government agents took him to his apartment and, after knocking on the door it was answered and opened by an individual in the residence. The agents, without invitation, entered and observed drug paraphernalia in plain view. They secured the apartment for 19 hours, obtained a search warrant and found cocaine, transaction records and additional evidence.

[¶17] On a motion to suppress, the court threw out the evidence recovered as a result of the initial entry which was unlawful, but denied the motion as to the evidence seized as a result of the warrant. The basis for the decision rested on the determination that the evidence seized with the warrant was gathered as a result of information wholly independent of the illegal conduct. The information for the warrant was provided by the initially arrestees rather than the illegal conduct. Therefore, the connection between theillegality and evidence was so attenuated as to remove the taint of the illegality. Id.

[¶18] Beane argued in hi motion in limine that the rationale of the Court in Segura seems to be the standard set by courts in prior and subsequent cases and is whether the connection between the evidence sought to be suppressed so attenuate as to remove the taint of illegality; or is there a source for the warrant (or bond conition in this case) which is independent of the illegal activity? Beane argues that the cases on this would require suppression. Although the bond search and seizure is removed from the illegal conduct in terms of time, it nevertheless resulted fro an order which has no basis independent of

the illegality and that but for the illegality, there would have been no order permitting the search without a warrant (bond).

[¶19] Beane further contends that the evidence was fruit of the poisonous tree. In his motion in limine, Beane argues that the conduct in his case appeared to be exactly the tpe of conduct in Wong Sun v. United States, 71 U.S. 471, 835 S.Ct. 407 (1963) and subsequent cases, which prohibit the use of evidence as fruit of the poisonous tree. Where evidence was come at by the exploitation of the primary illegality, it may not be used against an accused. Id. Evidence obtained as a result of illegally acquired evidence must be suppressed as fruit of the poisonous tree. State v. Gregg, 2000 ND 154, ¶39, 615 N.W.2d 515.

[¶20] Beane argues that the bond search on September 24, 2007 would not have occurred but for the initial illegal search of Beane on September 3, 2007. Therefore, the September 24, 2007 search same about by the exploitation of the primary illegality which occurred on September 3, 2007 and is fruit of the poisonous tree which must be suppressed.

[¶21] Lastly, Beane argues that if the evidence seized during the bond provision search of his residence on September 24, 2007 was not suppressed, that evidence could only be used for the purpose of revoking his bond.

CONCLUSION

[22] For all of the foregoing reasons, Mr. Beane asks this Court to reverse the district court's Order denying his motion in limine, the conviction, and remand with instructions to allow him to withdraw his guilty plea.

Dated this the 24th day of January, 2011.

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STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, v. Donald Beane, Defendant/Appellant.	)))))))))	Certificate of Service Supreme Court No. 20100380 Williams Co. No. 07-K-0980

I, Mark T. Blumer, do hereby certify that on January 24, 2011, I served the following documents:

1. Appellant's Appendix (PDF to Opposing Counsel and Supreme Court)
2. Appellant's Brief (PDF to Opposing Counsel and Word to Supreme Court)

On:

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Dated this the 24th day of January, 2011.

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