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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

JAN 30 2012

State of North Dakota)	STATE OF NORTH DAKOTA
)	
Plaintiff-Appellee)	Supreme Court Nos. 20110098
)	20110101
vs)	
)	Divide Co. Nos. 12-08-K-00063
Anna M. Hayes)	12-08-K-00064
)	12-08-K-00066
)	12-08-K-00067
Defendant-Appellant)	

APPEAL FROM JUDGMENT ENTERED MARCH 9, 2011 AND ORDER DENYING
 SUPPRESSION MOTION DATED SEPTEMBER 15, 2010
 DISTRICT COURT OF DIVIDE COUNTY
 NORTHWEST JUDICIAL DISTRICT
 DISTRICT COURT NOS. 12-08-K-00063, 00064, 00066 & 00067
 THE HONORABLE GERALD RUSTAD

PETITION FOR REHEARING

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STATEMENT OF THE CASE

[¶1] The State incorporates by reference its prior Statement of the Case in its Appellee's Brief for in this matter, but provides immediately below updated and additional procedural information relevant to this section.

[¶2] By opinion and judgment dated January 12, 2012, this Court reversed in part and remanded in part, affirming Hayes' two convictions for Driving Under Suspension and Possession of a Controlled Substance, which arose out of the December 1, 2008 traffic stop, and reversing the judgment for four convictions resulting from a warrantless search of 210 Adams Street on December 10, 2008.

STATEMENT OF THE FACTS

[¶3] The State incorporates by reference all prior facts as stated in its Appellee Brief, on file with the Court. However, for the purposes of this rehearing, the State specifically states to the Court the following facts:

- A. The suppression hearing in this matter was conducted on September 15, 2010, before the Honorable Gerald Rustad, Northwest Judicial District Court Judge. Immediately after the hearing, the district ruled in favor the State and denied the Motion to Suppress. Trans. dated September 15, 2010, at 35-36.
- B. At the said suppression hearing, the only witness to testify was the Defendant Anna Hayes. See Trans. dated September 15, 2010.

- C. Divide County Sheriff, Lauren Throntveit, did not testify at the suppression hearing or at any time before the district court denied the Defendant's motion to suppress. See Trans. dated September 15, 2010.
- D. This Court's opinion repeatedly cites testimony that was given by Sheriff Throntveit. The only testimony Sheriff Throntveit ever gave in the course of these proceedings was at trial, which was conducted over a month after the suppression hearing and the district court's related ruling. See Trans. dated September 15, 2012 and Jury Trial Transcript, dated October 21-22, 2010. All of the testimony of Sheriff Throntveit was given at the trial and trial only, contrary to the intimations made by this Court in its opinion. Sheriff Throntveit's testimony was not offered by the Defendant nor received by the district at the suppression on September 15, 2010, when the district court denied the Defendant's motion to suppress.
- E. Agent Derek Bernier did not testify at the suppression hearing or at any time before the district court denied the Defendant's motion to suppress. See Trans. dated September 15, 2010.
- F. This Court's opinion repeatedly cites testimony that was given by Agent Bernier. While the State did provide to the Court a copy of Agent Bernier's Report, dated December 10, 2008, which was filed with the State's response in resistance to the Defendant's motion to suppress, Agent Bernier did not testify at the suppression hearing. The only testimony Sheriff Throntveit

ever gave in the course of these proceedings was at trial, which was conducted over a month after the suppression hearing and the district court's related ruling. See Trans. dated September 15, 2012 and Jury Trial Transcript, dated October 21-22, 2010. All of the testimony of Agent Bernier was given at the trial and trial only, contrary to the intimations made by this Court in its opinion. Agent Bernier's testimony was not offered by the Defendant nor received by the district at the suppression on September 15, 2010, when the district court denied the Defendant's motion to suppress.

In its opinion, this Court relied on testimony given at trial, which occurred in excess of one month after the suppression hearing and the district court's denial of Defendant's request for suppression.

[¶4] An accurate review of the record provides that the Defendant and only the Defendant testified at the suppression hearing on September 15, 2010. Hayes testified that she was not residing at 210 Adams Street at the time this search was requested by law enforcement based on a condition of her bond order dated December 10, 2008. Trans. dated September 15, 2010, at 12. Hayes testified that she told law enforcement, during the December 10, 2008 encounter outside of the courtroom doors that she was actually residing at 211 Hagerud Street, in Noonan, North Dakota. She testified she gave law enforcement consent to search the Hagerud Street address, but that she did not live at the Adams Street address. Trans. dated September 15, 2010, at 12.

[¶5] At the September 15, 2012 suppression hearing, Hayes testified under cross examination:

“Q. Okay. Were you staying there [210 Adams Street], sleeping there, anything like that?

A. No.

Q. Okay. And it was solely your sister and her child who were residing there at the time, is that correct – or children?

A. Yes.”

Trans. dated September 15, 2010, at 19.

[¶6] Though Hayes testified, emphatically, that she did not reside, sleep or otherwise stay at the 210 Adams Street residence, she admitted during cross examination at the hearing that she claimed ownership of contraband found in the home. Trans. dated September 15, 2010, at 17-18.

[¶7] The State incorporated by reference arguments made on brief prior to the hearing and further argued that noting that Hayes testified, under oath, that she was not residing, living in, or otherwise staying in the home at the time the search was conducted. Therefore, the State argued that in addition to the arguments it made on brief prior to the hearing, it was adding the argument that Hayes did not have standing to object to the search of 210 Adams Street because she had no expectation of privacy in the home at the time of the December 10, 2008 search. Trans, dated September 15, 2010, at 23-31.

[¶8] Following the September 15, 2010 hearing, the district court denied the motion. Trans. dated September 15, 2010, at 35-39. For the purposes of the issues raised in this Petition for Rehearing the State notes that the district court then articulated it was “not convinced that a person has standing to object to a search of property that they’re not saying is not theirs.” Trans. dated September 15, 2010, at 35.

[¶9] The offenses were consolidated and a jury trial on all charges was conducted on October 21 and 22, 2010. Appx. at 85. The jury found Hayes guilty on all charges on, by verdicts dated October 22, 2010. Trans. dated October 21-22, 2010, at 261-263.

[¶10] On April 7, 2010, the Defendant timely filed a Notice of Appeal, appealing the March 9, 2010 criminal Judgments from the October 22, 2010 jury verdicts and further appealing “pretrial motions.” Appx. at 13.

[¶11] By opinion and judgment dated January 12, 2012, this Court reversed in part and remanded in part, affirming Hayes’ two convictions for Driving Under Suspension and Possession of a Controlled Substance, which arose out of the December 1, 2008 traffic stop, and reversing the judgment for four convictions resulting from a warrantless search of 210 Adams Street on December 10, 2008.

[¶12] The State petitions this Court for Rehearing, pursuant to N.D.R.App.P 40 on the basis that this Court, in reaching it’s opinion, has overlooked or missapprehended that facts that were actually available to the district court at the time the district court ruled, and therefore and further, this misapprehension has led to error with respect to the Court’s opinion as to standing and all other points of law on which this Court relied upon testimony from trial, rather than the testimony and evidence that was available to the district court at the suppression hearing itself.

LAW AND ARGUMENT

[¶13] The State agrees with this Court’s articulation of the applicable standard of review. However, the State reminds this Court that per “well-established” law on this point

“[T]he district court is in a superior position to assess the credibility of witnesses and weigh the evidence. State v. Woinarowicz, 2006 ND 179, ¶ 20, 720 N.W.2d 635 (citations omitted). Generally, a district court’s decision to deny a motion to suppress 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."

State v. Demars, 2007 ND 145, ¶ 7, 738 N.W.2d 486 (quoting State v. Albaugh, 2007 ND 86, ¶ 8, 732 N.W.2d 712) (alteration and emphasis added).

[¶14] Because this case involved issues of whether facts met certain legal standards, together with questions of constitutional magnitude, the State agrees with this Court's final conclusion that this case is fully reviewable.

[¶15] That said, the opinion of this Court went beyond "fully reviewing" the case, instead basing much of it's opinion upon facts that were not even available to the district court at the time of the district court's ruling on the suppression motion. This Court's opinion is in error because, while full review is certainly the correct standard of review, there is no precedent that would allow this Court to expand the fully reviewable standard to a point to which this Court may consider facts that were not before the district court when the district court makes a ruling. In this case, the district court did not have the testimony of Sheriff Lauren Throntveit or Agent Bernier available to it at the suppression, and this Court relies heavily on the testimony of these two individuals to reverse the district court's ruling. Like appellant court Justices, the State presumes that district court judges "are not expected to be psychics" and it is the burden of the moving party to, the Defendant in this case, to present the district court judge with fact and law in support of the Defendant's position. In this case, at the motion hearing, the Defendant called only herself, and did not put before the district court any other testimony, including that of Sheriff Throntveit or Agent Bernier, which this Court is not relying on for reversal. For this reason, this Court has misapprehended the application of the standard of review or misunderstands the procedural facts as they related to who testified and at what point in this case. State v. Noack, 2007 ND 82, ¶¶ 8-9, 732 N.W.2d 389.

I. THIS COURT MISAPPLIED THE APPLICABLE LAW AND AVAILABLE FACT WITH RESPECT TO THE STATE'S ARGUMENTS REGARDING FOURTH AMENDMENT STANDING

[¶16] During the September 15, 2010, Hayes testified that she was not living in the home subject to the search at issue on this appeal. Law enforcement searched 210 Adams Street located in Noonan, North Dakota, while Hayes testified that she was living at 211 Hagerud Street, in Noonan, North Dakota, on the date of the search. She went on to testify:

“Q. Okay. Were you staying there [210 Adams Street], sleeping there, anything like that?

A. No.

Q. Okay. And it was solely your sister and her child who were residing there at the time, is that correct – or children?

A. Yes.”

Trans. dated September 15, 2010, at 19.

[¶17] During the closing arguments made by counsel for the State and the Defendant, following Hayes’ testimony, the State argued that based upon Hayes testimony, she did not have standing to invoke Fourth Amendment protections for the home at 210 Adams Street. During the September 15, 2010 suppression hearing, the State argued:

“Mrs. Hayes has just plainly testified that 210 Adams Street wasn’t her house. And she’s previously briefed that. . . . And as a result, she doesn’t have any expectation of privacy in that home that’s protected under the Fourth Amendment. . . . If we believe her testimony, and I’m satisfied to believe for the purposes of this argument she has no standing and these arguments are mute [sic] in their entirety.”

Trans. dated September 15, 2010, at 23-24. The State affirmatively alleged that Hayes had no standing to invoke the Fourth Amendment following her own testimony on September 15, 2011.

[¶18] This Court, in State v. Ackerman, 499 N.W.2d 882, 884 (N.D. 1993), explained that a party must possess a legitimate expectation of privacy to gain standing to exercise the Fourth Amendment:

“The United States Supreme Court in Minnesota v. Olson, 495 U.S. 91, 95, 110 S.Ct. 1684, 1687, 109 L.Ed.2d 85, 92 (1990), said:

‘Since the decision in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), it has been the law that “capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.” Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978).’

[¶19] Further “[o]nce the State raises lack of standing, it is the defendant’s burden to establish that he had a legitimate expectation of privacy in the place searched. State v. Raywalt, 444 N.W.2d 688 (ND 1989) (citing State v. Benjamin, 417 N.W.2d 838, 839-40 (N.D. 1988) (alteration and emphasis added).

[¶20] Prior to the opinion issued in the present case, this Court has recognized that short-term or overnight guests do have a legitimate expectation of privacy while staying at the home or residence of another. However, this protected guest or invitee status is one that may be challenged by the State for lack of standing. In this case, there is absolutely no testimony, at the suppression or trial for that matter, that Hayes met either of these definitions.

[¶21] This Court did, however, provide that Fourth Amendment protection could extend to individuals under other unique criteria in reaching it’s opinion in this case. In the opinion for this case, this Court stated that “[L]egitimate presence in the area searched, possession or ownership of the area searched . . . , prior use of the area searched . . . , ability to control or exclude others” use of the property, and a subjective expectation of privacy” are relevant factors to a privacy expectation. United States v. Lochan, 674 F.2d

960, 965 (1st Cir. 1982). The State, for the purposes of this appeal, does not object to this holding, but does object to the analysis made by the Court based on this holding. In this Court's opinion, it said:

“Because the deed to 210 Adams Street is in Hayes' name, she pays the taxes, and she previously used the residence as her own, she enjoyed a subjective expectation of privacy in 210 Adams Street, and as a result, she has standing to contest the warrantless search.”

[¶22] At the suppression hearing, Hayes' property taxes never came up; Hayes did not provide the district court any information on this point before the district court ruled or even after the State challenged standing. See Trans. dated September 15, 2010, at 10-21. Over one month later, at trial, Sheriff Throntveit testified that Hayes paid the taxes.

[¶23] At the suppression hearing, Hayes did testify rather generally about the ownership of the home. See Trans. dated September 15, 2010, at 13. However, here testimony was that she “put the house in [her] name” because her sister “hadn't taken care of it”. Id. Contrary to this Court's opinion, there was no testimony regarding a deed and no deed regarding ownership of 210 Adams Street was put before the district court at any point in this proceeding. Further, Hayes testified that her mother became the owner of the home in 2001. See Trans. dated September 15, 2010, at 13. Hayes testified that before her mother passed away, Hayes' sister wanted the house, 210 Adams Street. She further testified that Hayes and her sister had an agreement that Hayes' sister could have 210 Adams Street because Hayes “already had a house”, which she testified was across the street from 210 Adams Street. See Trans. dated September 15, 2010, at 13. Hayes' testified that her sister never “put it in her name” so sometime in 2008, because her sister “had never taken care of it.” These are the facts from the horse's mouth and the only facts presented to the district court at the suppression hearing with respect to ownership, taxes and prior use of the home. The facts as given by the Defendant support the factual

findings and holding of the district court. The facts as given by the Defendant do not show that “the deed to 210 Adams Street is in Hayes’ name”, or that “she previously enjoyed the residence as her own.” For these reasons, if attention is paid to the evidence that was actually available at the time the district court ruled, deference is given to the findings of the district court based on that available evidence and conflicts in testimony are read in the light favorable to affirmance, it becomes clear that the order of the district court should have been affirmed here to the fact that Hayes did not have standing to invoke the Fourth Amendment.

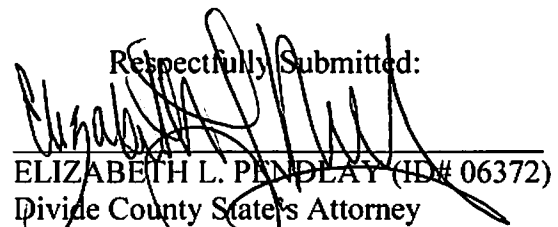
[¶24] Because the Defendant did not have standing to invoke Fourth Amendment protections, her other arguments became moot. Due to the fact that this Court does render advisory opinions, a question of the constitutionality of the warrantless search provision in the bond order of December 10, 2008 could not have been reached by this Court for lack of Hayes’ Fourth Amendment standing.

CONCLUSION

[¶25] Based upon the foregoing arguments, the State respectfully requests this Court grant rehearing in this matter and thereby restore the case to the calendar for reargument or resubmission doe the matter for this Court’s consider and further to affirm the September 15, 2010 order denying the Defendant’s motion to suppress and the criminal judgments in the above-captioned matters.

Dated this 30th day of January, 2012.

Respectfully Submitted:

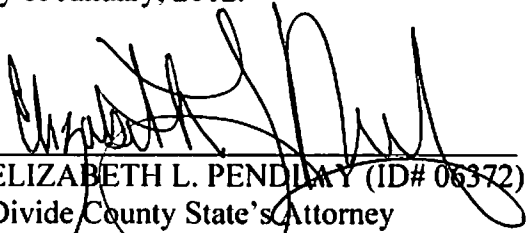

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CERTIFICATE OF SERVICE

I, Elizabeth L. Pendlay, do hereby certify that a true and correct copy of the foregoing **Petition for Rehearing**, was, on the 30th day of January, 2012, mailed, U.S. Certified Mail, postage prepaid, to the following individual:

Benjamin C. Pulkrabek
402 First Street N.W.
Mandan, ND 58554

Dated at Crosby, North Dakota, this 30th day of January, 2012.



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