

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO. 20110098 - 20110101

State of North Dakota,

Plaintiff-Appellee,

-vs-

Anna M. Hayes,

Defendant-Appellant.

APPEAL FROM JUDGMENT ENTERED MARCH 9, 2011
AND ORDER DENYING
SUPPRESSION MOTION DATED SEPTEMBER 15, 2010
NORTHWEST JUDICIAL DISTRICT
DIVIDE COUNTY CR. NO.'S 08-K-63/64/66/67
THE HONORABLE GERALD RUSTAD, PRESIDING

BRIEF

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ABBREVIATIONS

Page - P.

Line - L.

Transcript - Tr

Supp. - Suppression

Mo. - Motion

ISSUE

[¶1] In North Dakota, after a person has been arrested and charged with a class A Misdemeanor possession of marijuana, can the judge require that that person as a release condition consent to a warrantless search of her residence?

NATURE OF THE CASE

[¶2] On December 1, 2008 Defendant/Appellant Anna Marie Hayes was arrested while driving a vehicle without a drivers license. Ms. Hayes was searched after the arrest and marijuana was found in a plastic bag in one of the pockets of her coat.

[¶3] The bond set on the driving without a license and possession of marijuana charges was \$1500. On December 10, 2008 the bond was modified on the class A misdemeanor marijuana possession charge to include drug testing of Ms. Hayes and that she consent to a warrantless search of her residence.

[¶4] On December 10, 2008 Ms. Hayes was met outside the court house doors right after her bond had been modified, by narcotics agent, Derek Bernier. Agent Bernier knew the bond had been modified and he asked Ms. Hayes if she would consent to the search of her residence as per her bond condition. Ms. Hayes consented. During the search of Ms. Hayes residence drug paraphernalia and illegal product was found. Ms. Hayes was present during the search and while the search was going on admitted to ingesting methamphetamine and marijuana.

[¶5] After the December 10, 2008 search Ms. Hayes was charged with unlawful possession of drug paraphernalia methamphetamine and/or cocaine, unlawful possession of drug paraphernalia marijuana, ingesting a controlled substance marijuana

and ingesting a controlled substance methamphetamine.

[¶6] A suppression motion on evidence seized as a result of the search of 210 Adams Street in Noonan, North Dakota was heard on September 15, 2010. That motion was denied. A trial on all counts began on October 21, 2010. On October 22, a jury found Ms. Hayes guilty on all six counts.

[¶7] After judgment and sentence on March 9, 2011 Ms. Hayes timely appealed.

[¶8] This matter is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶9] On December 5, 2008 Chief Divide County Deputy Rob Melby and Deputy Cameron Kamlitz were on patrol in the City of Crosby, North Dakota. Prior to that time both deputies were aware of a suspended drivers license list at the Divide County Sheriff's Office and that one of the person' named on that list was Defendant/Appellant Anna Maria Hayes. Tr. P.73, L.14 to P.77, L9. Therefore when they saw Ms. Hayes driving a vehicle on December 5, 2008 they called North Dakota State Radio to find out if Ms. Hayes drivers license was still suspended. When State radio responded that Ms. Hayes's drivers license was still suspended they pulled Ms. Hayes over. After Ms. Hayes was pulled over Deputy Melby told Ms. Hayes her drivers license was suspended. Tr. P.77, L.13 to P.80, L1. Because Ms. Hayes didn't believe her license was suspended a second call was made to State radio to check the status of Ms. Hayes's drivers license. State radio again responded that Ms. Hayes license was suspended. Tr., 80, L.18 to P.81, L2.

[¶10] Deputy Melby then placed Ms. Hayes under arrest. Tr., P.95, L.6-7. Ms.

Hayes was then cuffed and taken to the Divide County Sheriff's Office where an inventory search of her person and purse was conducted. In the pocket of the jacket Ms. Hayes was wearing was found a small plastic bag with marijuana in it. Tr. P.81, L.3 to P.82, L.22.

[¶11] Ms. Hayes was released from the Divide County jail on the evening of December 5, 2008 after she posted a cash bond. Tr. P.101, L1 to P.102, L1.

[¶12] Ms. Hayes's initial court appearance was held on December 10, 2008. At that hearing she was informed of the charges against her and her rights. Tr. IA, P.2, L1 to P.3, L.12. Then the State requested that the \$1500 bond be modified on the class A misdemeanor marijuana charge so that it would include random drug testing and a search without a warrant of her person, vehicle, and residence. The Court granted the States requested modification and directed a new bail bond be prepared. Tr. IA, P.3, L.19 to P.6, L.15.

[¶13] On December 10, 2008, right after the Court ordered the modifying of Ms. Hayes bond, Ms. Hayes walked out the Courthouse door and was met by Derek Bernier, an agent from the Northwest Narcotics Task Force. Tr. P.132, L.19 to P.134, L.24.

When they met according to the transcript the following occurred:

“Q. Okay. And did you request anything of her when you met her outside those doors?”

A. Yes. I requested consent to search her residence as per her bond conditions from the previous hearing she had just attended.

Q. Okay. And did she consent?

A. Yes.”

Tr. P.135, L.1-7.

[¶14] Then Ms. Hayes told Agent Bernier her residence was not 210 Adams Street in Noonan, North Dakota. Tr. P.135, L.15-K. Ms. Hayes did admit her name is on the house at 210 Adams Street in Noonan, ND. Tr. Supp.Mo, P.12, L.1 to P.13, L.20.

[¶15] From the Courthouse, Agent Bernier took Ms. Hayes directly to the house at 210 Adams Street in Noonan, North Dakota. Upon arrival agent Bernier began searching the house. During that search he found a small glass vial, two plastic baggies, a light bulb devise, a spoon and a bowl or ask tray. Tr. P.136, L.11 to P.137, L.3.

[¶16] After the search Agent Bernier gave Ms. Hayes her Miranda Rights and then he interviewed her. During that interview Ms. Hayes told him she ingested Methamphetamine approximately 2 days prior and she would test positive for Marijuana if she submitted a urinalysis. She also stated the paraphernalia he found during the search was hers. Tr. 152, L.11, to P.153, L.3.

[¶17] Sharon Kraft was the only defense witness called by Ms. Hayes. Ms. Kraft testified that she became Ms. Hayes landlord in October of 2008 and the place she was renting to Ms. Hayes was 211 Hagerud in Noonan, North Dakota. Tr. P.192, L.1-14.

[¶18] Prior to the trial on October 21st and 22nd of 2010 a Suppression Motion was made by Ms. Hayes on September 15, 2010. The Suppression Motion was made to suppress all evidence seized as a result of the bond condition that allowed a warrantless search of 210 Adams St. in Noonan, ND on December 10, 2008. That Suppression

Motion was denied. Tr. Supp. Mo. P.35, L5 to P.36, L.18.

[¶19] The jury verdicts found Ms. Hayes guilty on all six counts. Tr. P.261, L.12 - P.236, L.16.

ARGUMENT

[¶20] ISSUE I In North Dakota, after a person has been arrested and charged with a class A misdemeanor possession of marijuana, can the judge require that that person as a release condition consent to a warrantless search of her residence?

[¶21] The standard of review for a trial court's denial of a suppression motion is found in *State v. Garrett*, 1998 ND 173, N.W.2d 502.

[¶11] In *State v. Sabinash*, 1998 ND 32, ¶8, 574 N.W.2d 827, we recalled our standard of review of a trial court's denial of a suppression motion, as enunciated in *State v. Bjornson*, 531 N.W.2d 315, 317 (N.D. 1995)(internal citations omitted):

The trial court's disposition of a motion to suppress will not be reversed if, after conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence. The standard of review recognizes the importance of the trial court's opportunity to observe the witnesses and assess their credibility, and we "accord great deference to its decision in suppression matters."

[¶22] In North Dakota individuals charged with felonies and misdemeanors can

be released before trial on any of the conditions in a criminal rule of procedure and/or a North Dakota Statute.

[¶23] The NDR of Crim. P is rule 46. The parts of that rule that apply to this appeal are 2 and 3.

(2) *Setting Release Conditions.* If the magistrate concludes that unconditional release is not appropriate, release conditions may be imposed, either in lieu of or in addition to the methods of release specified in Rule 46(a)(1). The magistrate may impose any release condition that will reasonably assure the appearance of the person for trial including:

- (A) placing the person in the custody of a designated person or organization agreeing to supervise the person;
- (B) requiring the person to maintain employment, or, if unemployed, to actively seek employment;
- (C) requiring the person to maintain or begin an educational program;
- (D) placing restrictions on the travel, association, or place of abode of the person during the period of release;
- (E) requiring the person to avoid all contact with an alleged victim of the crime or with a potential witness who may testify concerning the offense;
- (F) requiring the person to report on a regular basis to a designated law enforcement agency, or any other agency;
- (G) requiring the person to comply with a specified curfew;
- (H) requiring the person to refrain from possessing a firearm, destructive

device, or other dangerous weapon;

(I) requiring the person to refrain from any use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in N.D.C.C. ch. 19-03.1, without a prescription by a licenced medical practitioner; /

(J) requiring the person to undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and to remain in a specified institution if required for that purpose;

(K) requiring the execution of an appearance bond in a specified amount and the deposit with the court of cash or other security as directed, in an amount not to exceed ten percent of the amount of the bond, which deposit must be returned on performance of the release conditions;

(L) requiring the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu of a bill bond; or

(M) imposing any other conditions reasonably necessary to assure appearance as required, including a condition requiring the return of the person to custody after a specified time of day.

(3) *Release Condition Factors.* In determining conditions of release that will reasonably assure appearance of a person, the magistrate, on the basis of available information, must consider:

(A) the nature and circumstances of the offense charged;

(B) the weight of the evidence against the person;

(C) the person's family ties, employment, financial resources, character

and mental condition;

(D) the length of the person's residence in the community;

(E) the person's record of convictions;

(F) the person's record of appearance at court proceedings or of flight to avoid prosecution or failure to appear voluntarily at court proceedings;
and

(G) the nature and seriousness of the danger to any person or the community pose by the person's release.

[¶24] The North Dakota Statute is **NDCC 19-03.1-46. Bail – Additional conditions of release.** A court shall impose as a condition of release or bail that an individual who has been arrested upon a felony violation of this chapter or chapter 19-03.4 not use a controlled substance without a valid prescription from a licensed medical practitioner and that the individual submit to a medical examination or other reasonable random testing for the purpose of determining the person's use of a controlled substance. The court shall order the frequency of the random testing and the location at which random testing must occur. The court shall provide notice to the selected provider of the required examination or testing. The provider shall notify the court if the individual fails to appear for the examination or testing. The testing must be at the individual's own cost. Submission of an individual to a medical examination or other reasonable random testing as a condition for release is not required if the court makes a specific finding on the record that:

1. The individual has not been arrested for a felony offense relating to the use, possession, manufacture, or delivery of methamphetamine;

2. The individual will appear as required by the court and will comply with all conditions of release without submission to an examination or testing; and
3. Not imposing examination or testing as a condition of release will pose no danger to the individual or the community.

[¶25] NDR of Crim P 46 is an adaptation of Fed R.Crim P.46 - NDR Crim 46 was amended and effective in North Dakota on March 1, 1986. Since then NDR Crim P 46 has been amended six times. NDCC 19-03.1-46 was enacted in 2006. When NDR of Crim P 46 and NDCC 19-03.1-46 are considered together it appears that NDR of Crim P46 is the general release rule because it applies to all releases, NDCC 19-03.1-46 is a particular release rule because it applies only to conditions of release on felony drug charges.

[¶26] The prosecutor in the oral argument on the Suppression Motion in the case now before the court claimed a warrantless search of an individuals personal vehicle or residence could be ordered under NDR of Crim P 46(2)(M). The problem with such a claim is that if such a release condition could have been ordered under NDR of Crim P 46 there would have been no reason to enact NDCC 19-03.1-46. Since NDCC 19-03.1-46 is the special statute NDCC 1-02-07 applies to the interpretation of NDR of Crim P 46 and NDCC 19-03.1-46.

[¶27] **1-02-07. Particular controls general.** Whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable the special provision must prevail and must be construed as an exception to the

general provision, unless the general provision is enacted later and it is the manifest legislative intent that such general provision shall prevail.

[¶28] The drug crime, that Ms. Hayes is charged with Possession of Marijuana, is, because she was driving a car, a class A misdemeanor instead of a B misdemeanor. NDCC 19-03.1-46 only applies to felony violations of Chapter 19-03.1 and 19-03.4.

[¶29] Therefore there are two problems with the court imposing a condition of release that requires Ms. Hayes to consent to a warrantless search of her person, vehicle or residence. These problems are:

1. NDCC 19-03.1-46 only applies to felony drug violations and not to misdemeanor controlled substance violation and Ms. Haye's violation is a misdemeanor drug violation.
2. No where in NDCC 19-03.1-46 is there any language that permits as a condition of release a condition requiring that a person arrested and charged with either a felony or a misdemeanor consent to a warrantless search of her person, vehicle or residence.

[¶30] No case law can be found in North Dakota that requires a person who has been arrested and charged with a felony or misdemeanor to agree to a release condition that requires consent to a warrantless search of his or her person vehicle or residence.

[¶31] The only case law found where a condition of release requires consent of the person arrested to warrantless searches of one's person, vehicle or residence is United States Court of Appeals Ninth Circuit Appeals case United States of America vs Scott 450 F.3d 863.

[¶32] The following facts in the case before the court should be compared to the facts in Scott:

(1) Ms. Hayes was arrested for 2 misdemeanor offenses, driving while license suspended and possession of marijuana;

(2) Ms. Hays original bond on the 2 misdemeanors was \$1500.00;

(3) At Ms. Hayes initial court appearance her bond at the request of the prosecutor was amended and modified because of the class A misdemeanor marijuana drug charge;

(4) The court granted the prosecutors request and said it was standard procedure to amend Ms. Hayes conditions of release to include drug testing and to consent to a warrantless search of her person, vehicle and residence;

(5) The court ordered the prosecutor to draw up a release bond with the new conditions;

(6) When Ms. Hayes left the court room she was immediately met by Narcotics agent Derek Bernier who asked her to consent to the search of her residence per her bond condition;

(7) There was a dispute between Ms. Hayes and Agent Bernier over which house in Noonan, ND was Ms. Hayes residence;

(8) The house searched was at 210 Adams Street in Noonan, ND.

(9) After the search Ms. Hayes was given the Miranda warning and was interviewed;

(10) During the interview Ms. Hayes admitted to ingesting methamphetamine and marijuana.

[¶33] The facts in Scott are:

(1) Scott was arrested in Nevada on state charges of drug possession and released on his own recognizance. In order to qualify for release, Scott was required to sign a form stating that he agreed to comply with certain conditions. Among the conditions was consent to “random” drug testing “anytime of the day or night by any peace officer without a warrant,” and to having his home searched for drugs “by any peace officer anytime[,] day or night[,] without a warrant.” There is no evidence that the conditions were the result of findings made after any sort of hearing; rather, the United States concedes that the conditions were merely “checked off by a judge from a standard list of pretrial release conditions.”

Based on an informant’s tip, state officers went to Scott’s house and administered a urine test. The government concedes the tip did not establish probable cause. When Scott tested positive for methamphetamine,² the officers arrested him and searched his house. The search ultimately turned up a shotgun.

[¶34] The following language in Scott Supra sets out what is required to be established before a pretrial release condition can be imposed..

[¶35] We assume for purposes of our analysis that the non-law-enforcement purpose-the interest in judicial efficiency-is “primary” in this case. But the connection between the object of the test (drug use) and the harm to be avoided (non-appearance in court) is tenuous. One might imagine that a defendant who uses drugs while on pretrial release could be so overcome by the experience that he misses his court date. Or, having made it to court, he may be too mentally impaired to participate meaningfully in the proceedings. These are conceivable justifications, but the government has produced

nothing to suggest these problems are common enough to justify intruding on the privacy rights of every single defendant out on pretrial release. And it has produced nothing to suggest that Nevada found Scott to be particularly likely to engage in future drug use that would decrease his likelihood of appearing at trial.

[¶36] In the case before the court (the case) Ms. Hayes pretrial release condition on the consent to a warrantless search of her person, vehicle and residence was imposed at the initial appearance. At that hearing the prosecutor said:

MS. PENDLAY: Yes, your Honor. And actually she was given a cash bond during the course of this arrest and I would request an amended bond order, your Honor.

In addition to the \$1,500 ca - - cash bond she posted, I would request a bond order requiring that the Defendant submit to random drug testing including, but not limited to, urinalysis as requested by a law enforcement officer. And that the Defendant submit to searches without a warrant of her person, vehicle or vehicles, and home at the request of law enforcement. Tr. IA, P.3, L.19-25, P.4, L1-3.

[¶37] The judges responses were:

THE COURT: Okay. When - - when a person is charged with violation of the drug statues in North Dakota, a standard provision of bond is to require drug testing on a random basis. That doesn't mean that it will happen, it means that the law enforcement officials have the right to check you. Tr. IA, P.4, L.12-17.

THE COURT: I am going to, however, modify the bail as it relates to the possession of controlled substance charge, per the request of the State. a new bail will be prepared. Tr. IA, P.6, L. 12-15.

[¶38] The prosecutor then said:

MS. PENDLAY: I have an amended bond ready, your Honor. Tr. IA, P.6, L. 17-18

[¶39] Scott requires evidence and/or testimony to show why the release condition is necessary and that without it there is a decreased likelihood of appearing at trial. Therefore the prosecutor in the case should have put in testimony or evidence to show how without a warrantless consent search of Ms. Hayes residence her likelihood of appearing at trial would decrease.

[¶40] According to Scott Supra. Pretrial releases are not probationers. “Probation, like incarceration, is ‘a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.’ People released pending trial, by contrast, have suffered no judicial abridgement of their constitutional rights.¹¹ On the privacy side, probationers have sharply reduced liberty and privacy interests: Probation is a form of criminal punishment, so “probationers ‘do not enjoy “the absolute liberty to which every citizen is entitled.””

[¶41] In the case Ms. Hayes is not a probationer she is a person on pretrial release. Therefore according to Scott she should not have been required as a condition of her pretrial release to give up her constitutional rights and consent to a warrantless search of her person, vehicle and residence.

[¶42] The following quote from Scott Supra explains why an arrest by itself is not sufficient to establish a pretrial release condition that the person seeking pretrial release possess a heightened risk of misbehaving:

Thus, the Supreme Court upheld the constitutionality of a bail system where pretrial defendants could be detained only if the need to detain them was demonstrated on an individualized basis. The arrest alone did not establish

defendant's dangerousness; it merely triggered the ability to hold a hearing during which such a determination might be made. It follows that if a defendant is to be released subject to bail conditions that will help protect the community from the risk of crimes he might commit while on bail, the conditions must be justified by a showing that defendant poses a heightened risk of misbehaving while on bail. The government cannot, as it is trying to do in this case, short-circuit the process by claiming that the arrest itself is sufficient to establish that the conditions are required.

[¶43] In the case at the Initial Appearance when the pretrial release conditions of Ms. Hayes were amended there was no testimony given or evidence presented by the State that in anyway indicated she possessed a heighten risk of misbehaving. The fact that no evidence or testimony was presented to indicate there was a heighten risk of Ms. Hayes misbehaving is one more reason why the trial judge shouldn't have imposed a pretrial release condition that required Ms. Hayes to consent to a warrantless search of her person, vehicle or residence.

[¶44] In the case the arrest appears to be the only reason for the pretrial release condition.

CONCLUSION

[¶45] The only release conditions a North Dakota Judge can impose on a person arrested and charge for a crime in North Dakota are found in NDR of Crim P 46 and NDCC 19-03.1-46. From these conditions a judge can select the release conditions he believes will best assure the arrested person's appearance at trial.

[¶46] In this case the prosecutor requested the terms of release be amended and

modified to include a consent by Ms. Hayes to a warrantless search of her person, vehicle, or residence. The judge granted the prosecutors request and ordered the conditions of bond include a warrantless search of Ms. Hayes person, vehicle and residence. The problem with this amended condition is it isn't allowed by either NDR of Crim P or NDCC 19-03.2-46.

[¶47] Any release condition for a person charged with a felony or misdemeanor are to assure that that person will appear at the trial. In the case there is a narcotic agent Derek Bernier at the hearing on release conditions. Agent Bernier is waiting for the judge to amend the release conditions to include a consent to a warrantless search of Ms. Hayes residence. Therefore the release condition for a consent to a warrantless search has nothing to do with Ms. Hayes appearing at trial at a later date. Instead, the reason for the release condition is to immediately allow the agent the search at 210 Adams Street in Noonan, North Dakota.

[¶48] The consent to a search warrant condition in the case is really an end run around the search warrant requirement of the 4th Amendment. Before such an end run can be made there has to be a statute or rule of procedure allowing a consent to a warrantless search. Then there has to be a hearing at which the prosecutor has to present testimony and evidence that a consent to a warrantless search is a necessary condition to assure the appearance of the person arrested at trial.

[¶49] Because of the above all evidence seized during the search of 210 Adams (a house owned by Ms. Hayes) should be suppressed. Also any statements made by Ms. Hayes at 210 Adams Street should be suppressed because they are fruit of the poisonous tree.

DATED this 22nd day of June, 2011.

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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 22nd day of June, 2011.

Elizabeth L. Pendlay
Divide County State's Attorney
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/s/ Sharon Renfrow
Sharon Renfrow