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STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

State of North Dakota,        )  
  )  
          Plaintiff-Appellee,    ) Sup. Ct. No.: 20130141  
  )  
          vs.                            )  
  ) Dist. Ct. No.: 53-2012-CR-02376  
Andrew Canfield,                )  
  )  
          Defendant-Appellant.    )

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**APPEAL FROM THE FEBRUARY 11, 2013 ORDER  
DENYING CANFIELD'S MOTION TO SUPPRESS EVIDENCE,  
THE HONORABLE JOSHUA B. RUSTAD PRESIDING**

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**BRIEF OF APPELLEE,  
STATE OF NORTH DAKOTA**

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## Table of Contents

<u>Item</u>	<u>Page/paragraph</u>
Table of Contents .....	i
Table of authorities .....	ii
Statement of the Issues .....	1
Statement of the Case .....	2 – 4
Statement of the Facts .....	5 – 13
Law and Argument .....	14 – 45
Conclusion .....	46

**Table of Authorities**

<i><u>North Dakota cases</u></i>	<i><u>Paragraph</u></i>
<i><u>State v. Decoteau</u></i> , 1999 ND 77, 592 N.W.2d 579 .....	38
<i><u>State v. Gagnon</u></i> , 2012 ND 198, 821 N.W.2d 373 .....	throughout
<i><u>State v. Schmalz</u></i> , 2008 ND 27, 744 N.W.2d 734 .....	39
<i><u>State v. Uran</u></i> , 2008 ND 223, 787 N.W.2d 727 .....	44

### **Statement of the Issues**

[¶1] I: The District Court correctly denied Canfield's motion to suppress evidence.

### **Statement of the Case**

[¶2] On approximately October 2, 2012, Canfield was charged with Conspiracy to Manufacture Methamphetamine Class-AA Felony for conspiring to have a methamphetamine laboratory at Williston State College; Possession of Drug Paraphernalia, Class-C Felony for ingestion paraphernalia and laboratory components; Possession of Drug Paraphernalia, Class-A Misdemeanor for packaging paraphernalia for methamphetamine; and Ingestion of a Controlled Substance, Class-A Misdemeanor for ingesting methamphetamine.

[¶3] Canfield waived a preliminary hearing on November 6, 2012. Canfield filed a suppression motion on or about January 11, 2013. The State filed a response on January 31, 2013. The District Court denied Canfield's suppression motion on February 11, 2013.

[¶4] This case went to trial on February 27, 2013, where Canfield was convicted of all charges except for the Class-A Misdemeanor paraphernalia charge. Canfield subsequently appealed.

### **Statement of the Facts**

[¶5] On October 2, 2012, Ms. Fink, the head of housing for Williston State College, requested an officer to come to the College and go to a dorm room with her where there were reports of marijuana usage.

[¶6] Officer Dickerson was the only officer who responded, and went with Ms. Fink to the dorm room assigned to Canfield at Williston State College. Ms. Fink knocked on the door, and was met by a female who was unknown to her. Ms. Fink entered the dorm room, and Officer Dickerson stood outside at the doorway.

[¶7] At the time Ms. Fink entered the room, there were four (4) individuals inside. These individuals appeared to be under the influence of controlled substances based on their actions and appearance.

[¶8] Officer Dickerson observed two pipes inside the dorm room that appeared to be drug paraphernalia based on their design and the residue associated with the pipes. All of the individuals in the room had access to the paraphernalia that was observed.

[¶9] Officer Dickerson discovered that he did not have sufficient handcuffs to detain all of the individuals inside the room. Officer Dickerson made entry into the dorm room to secure the scene, and collected the two pipes.

[¶10] Once he made entry, Officer Dickerson observed one of the females inside the room trying to manipulate and conceal items, including her purse.

[¶11] Officer Dickerson continued attempting to secure the scene until additional law enforcement arrived.

[¶12] Agent Bernier of the Northwest Narcotics Task Force obtained consent to search the dorm room from Canfield, who had been brought to the dormitory by Williston State College staff. For purposes of this appeal, Canfield appears to concede that both the consent and any statements were given or made voluntarily.

[¶13] Law enforcement found a reaction vessel from a methamphetamine laboratory, bottles of methamphetamine "oil," empty pseudoephedrine packages, lithium

metal, camping fuel, coffee filters, a funnel, salt, tubing, and various other components of a methamphetamine laboratory inside the dorm room. Other items of ingestion and storage paraphernalia were also found inside the dorm room.

### Law and Argument

*Canfield's invalid consent claim is meritless.*

[¶14] Ms. Fink, then the head of housing at Williston State College, was the one who made contact with the occupants of Canfield's room after receiving reports of drug use. It is undisputed that per the Williston State College housing contract, members of Williston State College staff could enter housing units. Ms. Fink was not acting at the direction of law enforcement at the time she knocked on the door, and her entry was authorized pursuant to the housing agreement.

[¶15] Interestingly, Canfield seems to contend that it was improper for Ms. Fink, or anyone else, to enter the room after discovering that the room had four people in it who were not supposed to be there.

[¶16] If anything, discovery of persons in a structure who were not supposed to be there would give rise to at least removing them from the structure, if not detaining them for trespass until any authority for them to be there could be determined.

*Canfield's claim that Officer Dickerson was searching, or entered the room, or removed things from Canfield's dorm room after additional law enforcement arrived is meritless.*

[¶17] This argument is found in paragraph fourteen (14) of Canfield's brief, and is completely unclear as to what is being claimed. By Officer Dickerson's testimony at his deposition, his entry into the dorm room was to try to secure the situation because he

did not have enough handcuffs to properly detain everyone. If there were other officers present, then the handcuff count would not have been an issue.

[¶18] Canfield is appearing to argue that Officer Dickerson waited until additional law enforcement arrived before entering to detain the individuals inside. The State has no idea where this claim originated. It has no basis in the facts that were presented to the District Court through the documents filed on the suppression issue.

[¶19] It seems to be an attempt to distort the timeframe as to what happened at the dorm room to make this case appear to fit Gagnon. The fact pattern set forth by the State, and not disputed by Canfield, was that Officer Dickerson arrived with Ms. Fink. That Officer Dickerson observed the four individuals inside along with items of drug paraphernalia and entered to secure the scene and those at it due to the number of individuals involved and his lack of equipment. Backup arrived after Officer Dickerson was attempting to secure the scene.

[¶20] As such, any claims that Officer Dickerson waited for backup to arrive before going into the dorm room are simply frivolous.

*Gagnon does not support suppression.*

[¶21] Gagnon involved a residence in Douglas, North Dakota, where Probation Officer Nason observed marijuana plants growing in a window while he was out campaigning. State v. Gagnon, 2012 ND 198, 821 N.W.2d 373. Probation Officer Nason contacted members of a drug task force about the plants the next day. After approximately one week, law enforcement made a warrantless entry into the residence. Id.

[¶22] Canfield’s claim that this matter is “very similar” factually to Gagnon is simply incorrect. In reality the facts are divergent. For this matter to be the “very similar” factually, the following would have to occur: 1) Officer Dickerson in plain clothes sees contraband with no one around it in the dorm room and without being seen; 2) Officer Dickerson reports what is seen to a member of a drug task force; 3) no one in law enforcement does anything with the information for days; 4) after approximately one week, a task force agent sees the contraband in the exact same spot with no one around it; 5) a task force agent observes no one near the contraband for forty-five minutes while on scene; 6) after waiting for approximately one week, law enforcement enters to prevent destruction/concealment of evidence.

[¶23] Unlike Gagnon, Officer Dickerson, the only initially responding officer, observed four individuals in the room in close proximity to drug paraphernalia. Officer Dickerson also observed that these individuals appeared to be under the influence of controlled substances. Despite the obvious difference in the proximity of persons to contraband, Canfield continues to claim that this case is “very similar” factually to Gagnon.

[¶24] This is not a scenario involving two marijuana plants growing in a window with nobody in apparent proximity to them, and no indication that any of the persons growing the marijuana plants even knew law enforcement had seen them. Indeed, in Gagnon, the officer who observed the marijuana plants was in plain clothes campaigning for an individual running for Sheriff. Gagnon, 2012 ND 198, ¶2, 821 N.W.2d 373.

[¶25] Here, the four individuals inside the dorm room were acutely aware of law enforcement’s presence, as Officer Dickerson was standing in the doorway outside of the



room. Unlike the individuals in Gagnon, the persons inside Canfield's dorm room knew the gig was up. This information was brought to its logical progression when at least one of the female occupants tried to conceal and/or manipulate items in the room.

[¶26] There is a stark comparison between the two matters. As the Gagnon Court noted: "... Gagnon's failure to remove the marijuana from the window and Yellowbird's invitation that the officers 'come in,' indicate Gagnon and Yellowbird were unaware that their residence was being observed by law enforcement until Niebuhr and Huber walked in their door." Gagnon, 2012 ND 198, ¶14, 821 N.W.2d 373.

[¶27] Despite this obvious difference, Canfield continues to claim that this case is "very similar" factually to Gagnon.

[¶28] Officer Dickerson did not have sufficient handcuffs to detain the four individuals involved who then knew that law enforcement was aware of criminal activities in the dorm room. Every one of the four individuals inside of the dorm room had proximity to the various items of narcotics paraphernalia including two glass pipes, one for marijuana and one for methamphetamine which, unlike marijuana plants, are small enough to be hidden or destroyed without many visual cues.

[¶29] When Officer Dickerson entered to attempt to secure the scene and the individuals involved, he observed at least one of the females in the room manipulating and trying to conceal items. This is directly the opposite Gagnon's failure to move the marijuana plants in the window. Here, attempts to manipulate, conceal, tamper, etc. with the evidence were under way. This demonstrates that the four individuals inside the room were aware that law enforcement observed the illegal activity, and that the circumstances were such that evidence destruction was a serious threat.

[¶30] There was no one-week delay in this case. This is directly the opposite of this Court's findings in Gagnon. This Court specifically noted:

The timeline of events in this case does not support the conclusion a warrantless search was necessary to avoid imminent destruction of evidence. Nason observed marijuana in Gagnon's window on May 28 and reported this observation to the BCI on May 29. When Niebuhr traveled to Douglas on June 3, marijuana plants were still in Gagnon's window. Gagnon, 2012 ND 198, ¶14, 821 N.W.2d 373

[¶31] Officer Dickerson had only moments to act as opposed to the days available to various agencies in Gagnon. Many options were available in Gagnon that were not available here.

[¶32] If, and only if, the above-referenced six things occurred in this case, this matter would be "very similar" factually to Gagnon. The Gagnon decision is essentially punitive in nature. This Court repeatedly noted that law enforcement had days to obtain a search warrant while nothing appeared to change at the residence, yet failed to do so. The instant case is vastly different from that scenario.

[¶33] To summarize: in Gagnon, neither defendant knew of law enforcement's interest. Here, all occupants of the room would have known. In Gagnon, nobody was seen in proximity to the marijuana plants. Here, four individuals were present in the immediate vicinity of the drug paraphernalia. In Gagnon, law enforcement had "ample time," i.e. days to obtain a warrant. Here, Officer Dickerson had a minutes at best. In Gagnon, there was no indication of evidence destruction, concealment, or tampering upon entry into the residence. Here, when Officer Dickerson entered, he observed one female trying to manipulate and conceal items.

*Canfield's "dorm room was too small to destroy evidence" argument is newly raised on appeal.*

[¶34] This claim was not before the District Court. Arguments newly raised on appeal and not previously before the District Court should be rejected. E.g. State v. Johnson, 2011 ND 48, ¶17, 795 N.W.2d 367.

[¶35] In any event, the items observed were small enough to be concealed on a person or other location without attracting attention. Further, glass pipes are fragile enough to be easily destroyed.

[¶36] There is also the fact that four persons occupied the dorm room, each with access to the paraphernalia in the room, and each of whom knew law enforcement was aware of illegal items in the room. Coupled with that is the fact that the only officer initially on scene did not have sufficient equipment to secure the four individuals to prevent them from tampering with the items seen. One officer cannot watch everybody. *Exigent circumstances existed in this case.*

[¶37] Even the Gagnon Court noted that exigent circumstances exist when there is an imminent threat of destruction of evidence. Gagnon, 2012 ND 198, ¶13, 821 N.W.2d 373.

[¶38] When determining whether exigent circumstances exist, the first question is whether law enforcement had probable cause. See. State v. DeCoteau, 1999 ND 77, 592 N.W.2d 579. In this case, the question would be whether Officer Dickerson had probable cause to believe that the pipes he observed in plain view were contraband.

[¶39] Officer Dickerson has training and experience in the detection of narcotics and/or narcotics paraphernalia. When he was deposed by Canfield's attorney, Officer

Dickerson testified that he observed residue consistent with methamphetamine residue in one pipe, and residue consistent with marijuana residue in the other pipe. He also testified that the methamphetamine pipe was made from a shaped cigar tube, and that the marijuana pipe was a multicolored glass pipe with tinfoil. Officer Dickerson recognized the pipes as paraphernalia for ingesting methamphetamine and marijuana respectively based on the observable residues and their construction. This is sufficient for probable cause. See. State v. Schmalz, 2008 ND 27, ¶11, 744 N.W.2d 734.

[¶40] As noted above, there was a serious threat of imminent evidence destruction, tampering, or concealment. Four individuals were occupying the room, they all had access to the paraphernalia in the room, there was only one officer present who did not have enough handcuffs to detain the individuals. The items initially observed, glass pipes, are small enough and fragile enough to be easily destroyed before such destruction is noticed. Evidence manipulation and concealment was occurring when Officer Dickerson entered. Not only was there a threat of imminent evidence destruction, at least one individual was attempting to engage in such activity.

*Canfield's consent to search the room was valid.*

[¶41] As noted above, the Gagnon Court was concerned about the facts that were specific to that particular case, most specifically the timeframes involved. The Court noted there was “ample time – here days – available to secure a warrant.” Gagnon, 2012 ND 198, ¶14, 821 N.W.2d 373. The Court also specifically noted that its holding was “under the facts of this case.” Id. at ¶14

[¶42] Here, despite Canfield’s fervent attempts to make this case be “very similar” factually to Gagnon, it is not. Therefore, this Court’s concerns in Gagnon are not present in this matter.

[¶43] Consent has traditionally been an exception to the warrant requirement. E.g. State v. Uran, 2008 ND 223, ¶7, 758 N.W.2d 727. In this case, Canfield gave valid consent to search the dorm room. As the issue is not challenged by Canfield on appeal, it appears that he is conceding that his consent and his statements were voluntarily made. *Canfield’s fruit of the poisonous tree claim lacks merit.*

[¶44] The entry by Officer Dickerson was properly made to address the potential for evidence destruction present with multiple individuals in a room, each of which have access to contraband inside the room, and each of which had knowledge that law enforcement knew of the illegal activities inside.

[¶45] As entry was proper due to exigent circumstances, and the consent to search was valid, there is no fruit of the poisonous tree.

#### Conclusion

[¶46] The District Court correctly denied Canfield’s motion, and correctly determined that this case is not “very similar” to Gagnon. Therefore, the State respectfully requests that this Court affirm the District Court’s decision.

Dated this 26<sup>th</sup> day of July, 2013.

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JUL 16 2013

Certificate of Service

STATE OF NORTH DAKOTA

I, Nathan Kirke Madden, hereby certify that on July 16, 2013, a true and accurate copy of the State's Appellee's Brief was served on Attorney Jeff Nehring via email.

Dated this 16<sup>th</sup> day of July, 2013.

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JUL 26 2013

Certificate of Service

I, Nathan Kirke Madden, hereby certify that on July 26, 2013, a true and accurate copy of the State's Appellee's Brief was served on Attorney Jeff Nehring via email. STATE OF NORTH DAKOTA

Dated this 26<sup>th</sup> day of July, 2013.

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