

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

State of North Dakota,)
))
Plaintiff-Appellee,) Sup. Crt. No. 20130141
))
vs.))
) Dist. Crt. No.: 53-2012-CR-2376
Andrew Canfield,))
))
Defendant-Appellant.))

**APPELLEE’S PETITION FOR
REHEARING**

APPEAL FROM THE DISTRICT COURT’S
FEBRUARY 11, 2013 ORDER DENYING CANFIELD’S
MOTION TO SUPPRESS, THE HONORABLE
JUDGE JOSHUA RUSTAD PRESIDING

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Statement of the Facts

¶1 Canfield filed a suppression motion in the instant District Court matter under N.D.R.Ct. 3.2. Canfield attached no affidavits or other evidence to the motion. Canfield expressly stated that he was waiving a hearing, and never requested one to put on evidence for a *prima facie* showing of illegality. The State filed a timely response. There was no stipulation to any facts. The District Court denied Canfield's suppression motion.

¶2 Canfield never moved the District Court to reconsider based on not having a hearing. Canfield never included this issue in his Brief before this Court and the State did not brief the matter as it was not included as an assignment of error in Canfield's filings.

Law and Argument

¶3 The original decision by this Court is far reaching in its scope, and could affect both criminal and civil matters. In reaching an issue never raised by Canfield at any level, and apparently misapprehending the effects of Canfield's waiver of any hearing and failure to make a *prima facie* showing, it throws into uncertainty the effects of waiving hearings and failing to meet evidentiary burdens. It imposes a *de facto* requirement to hold an evidentiary hearing even when one is waived, nullifies the effect of that waiver, and provides criminal and civil parties with a way to escape the decision to move forward without meeting evidentiary burdens.

¶4 Given that this matter was never raised by Canfield, its effects on motion practice, and the lack of briefing due to Canfield's abandonment of the issue, the State respectfully requests that this Court either rehear the matter or allow for resubmission of briefs on the matter.

This Court misapprehended the differences between the instant case and Avila, and Canfield's failure to make it past the prima facie showing of illegality.

[¶5] There are two ways that a defendant can make the *prima facie* showing of an illegal search before the State need present anything: attaching evidence to the motion and/or presenting evidence at a hearing. Canfield attached nothing to his motion. Canfield waived any hearing on the motion. Canfield and the State had no stipulations as to the facts.

[¶6] The lack of any stipulation to facts places this matter well outside of Avila, as the stipulation in Avila would be sufficient to make the *prima facie* showing. Compare. State v. Avila, 1997 ND 142, ¶9, 566 N.W.2d 410.

[¶7] Per existing case law on suppression, a defendant must make a *prima facie* showing of illegality before the State need to present any evidence. E.g. Id. Here, there was absolutely no presentation of any evidence by Canfield whatsoever.

[¶8] It is well established that the moving party bears the burden of demanding and setting a hearing if the party so desires. E.g. Gosbee v. Martinson, 2005 ND 10, ¶19, 701 N.W.2d 411; In re the Estate of Ralph Bartelson, 2013 ND 129, 833 N.W.2d 522 (party wishing to present material at hearing must ask for hearing). Even after the State filed its response, Canfield did not demand a hearing within the seven (7) days provided by N.D.R.Ct. 3.2. Canfield decided to waive any hearings and proceed forward with the documents as filed.

[¶9] The record clearly establishes that Canfield failed to meet the simple burden of presenting evidence to establish a *prima facie* case. Any failure to have a clear record is a failure of Canfield to meet his burden, and should not be considered as a reason to

give him a second bite at the apple. State v. Mittleider, 2011 ND 242, ¶17, 809 N.W.2d 303 (record unclear as to the location of no trespassing signs).

[¶10] As Canfield failed to clear the first hurdle, it would not matter if the State had even failed to respond. The District Court would not even need to consider the State's response as Canfield's filing was insufficient to reach that point.

[¶11] The State submits that the record contains sufficient information to determine that the District Court's denial of the motion should be affirmed. Anything different would remove the *prima facie* showing requirement, and place an improper burden on the State.

The appropriate analysis is obvious error or a determination of abandonment of the issue on appeal.

[¶12] Here, Canfield waived a hearing on the suppression motion. This Court even noted: "An evidentiary hearing on the suppression motion was waived, and a review of the record shows no supporting evidence was offered with either party's brief." Criminal defendants can waive virtually anything. State v. Keener, 2008 ND 156, ¶21, 755 N.W.2d 462.

[¶13] Canfield did not move the District Court to reconsider its decision based on not having a hearing. In essence, Canfield failed to preserve the issue for appeal. See. State v. Lunday III, 2009 ND 9, 760 N.W.2d 136.

[¶14] Waiving various procedural matters and/or failing to object at the District Court and/or not raising a matter below results in, at best, an obvious error analysis. E.g. State v. Miller, 2010 ND 240, 795 N.W.2d 38; State v. Glass, 2000 ND 212, 620 N.W.2d

146. Generally, the failure to raise the issue at the district court level results in a refusal to entertain claims on appeal.

[¶15] The obvious error standard asks if there was obvious error that affected a defendant's substantial rights. E.g. State v. Heupel, 2003 ND 107, 670 N.W.2d 359. Here, it was Canfield's choice to move forward while waiving a hearing on his suppression motion. Even after the State responded, he chose to continue waiving a hearing on the matter. He has never made any showing of how the District Court's denial of the motion without hearing, after his repeated failure to demand one affected a substantial right.

[¶16] Further, Canfield made no arguments regarding this issue in his appeal Brief before this Court. The matter was not one of the assignments of error, and it was not included in any of the briefing. As it was not presented to this Court, the matter was abandoned for purposes of appeal. Anderson v. Heinze, 2002 ND 60, ¶12, 643 N.W.2d 24.

[¶17] The State notes that nullifying the effect of waiving a hearing, the effect of waiving the opportunity to present additional evidence in support of documentation, and the effect of abandoning an issue on appeal creates far reaching implications in any scenario where a party has to meet certain burdens and has the choice of a hearing.

[¶18] Currently, by filing a motion without any support and waiving any opportunity to provide that support, taking the case to a jury trial, and filing an appeal Canfield has been able to escape the consequences of his waiver without showing any obvious error, or without showing why the issue has not been abandoned for his failure to object below or address it on appeal.

¶19 Essentially by failing to make a record, failing to request a hearing, and failing to provide evidentiary support, Canfield gets a second chance on the motion and gets a benefit he expressly chose to waive. If a waiver of a hearing has no effect, then the provisions of N.D.R.Ct. 3.2(a)(3) have no effect.

Conclusion

¶20 Canfield made the decision to waive a hearing on the matter where he could have presented the evidence that was lacking from his documents to make a *prima facie* showing to place the burden on the State. Canfield made the decision to move forward without any evidentiary support. Canfield made the decision not to raise that issue on appeal.

¶21 Canfield never raised issue of not having a hearing at any level, and therefore abandoned the matter. As a result of this matter not being raised, there was no opportunity to brief the issue. The instant decision erases state precedent on a defendant's burden for suppression motions, erases the burden on a moving party to establish a record to show an error, conflicts with controlling Eighth Circuit cases such as United States v. Phillips, 540 F.2d 319 (8th Cir. 1976), alters the effect of waivers, and nullifies the requirement of a moving party to request a hearing under N.D.R.Ct. 3.2 if it wants one. Given that the matter was not briefed by either party, the State respectfully requests that this Court grant a rehearing or an opportunity to resubmit briefs on the issues.

Dated this 2nd day of January, 2014. /s/ Nathan Kirke Madden

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Certificate of Service

I, Nathan Kirke Madden, hereby certify that on January 2, 2014, a true and accurate copy of the State's Petition for Rehearing was served on Attorney Jeff Nehring via email.

Dated this 2nd day of January, 2014. /s/ Nathan Kirke Madden
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