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OCTOBER 16, 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, vs. Cory Reis, Defendant/Appellant.	)	Supreme Court No. 20130192 District Court No. 30-2013-CR-00002

BRIEF OF APPELLANT REIS

APPEAL FROM THE DISTRICT COURT'S DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND THE SUBSEQUENTLY ENTERED CRIMINAL JUDGMENT OF JUNE 14, 2013
MORTON COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE BRUCE ROMANICK

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STATEMENT OF THE ISSUES

[¶1] The District Court improperly denied Reis's Motion to Suppress the Search of the Vehicle.

STATEMENT OF THE CASE

[¶2] It should be noted that this case, Supreme Court No. 20130192 (Morton Co 30-2013-CR-00002), is based upon the same fact pattern in Supreme Court No. 20130193 (Burleigh Co 08-2012-CR-02377) and Supreme Court No. 20130194 (Burleigh Co 08-2012-CR-02899). In Supreme Court No. 20130193 (Burleigh Co 08-2012-CR-02377), Reis was charged with four counts of Possession of Controlled Substance with Intent to Deliver and two counts of Possession of Paraphernalia. Subsequently in Supreme Court No. 20130194 (Burleigh Co 08-2012-CR-02899), Reis was charged with another count of Possession of Controlled Substance with Intent to Deliver. In this matter, Supreme Court No. 20130192 (Morton Co 30-2013-CR-00002), Reis was subsequently charged with Burglary and Theft of Property, information for which was obtained from the interview from the illegal search in the Burleigh County matters. As the information used to charge Reis in Morton County was "Fruit of the Poisonous Tree" from a search in Burleigh County, the underlying Burleigh County search is relevant, as if the Burleigh County search is held to be illegal, then the evidence from the subsequent charges in Morton County that rely on information from the Burleigh County cases should also be suppressed. The matters were not consolidated at the district court or on appeal.

[¶3] Defendant and Appellant Cory Reis (Reis) was charged with the offenses of Burglary and Theft of Property, alleged to have occurred on or about September 5, 2012 in Morton County. Law enforcement had obtained information regarding Reis's Morton County charges from a search that occurred in Burleigh County. That search in Burleigh County is on appeal in Supreme Court 20130193 and 20130194. Contesting the right and authority of law enforcement to search his vehicle, Reis filed a Motion to Suppress the

evidence against him based upon his Burleigh County motion to suppress in those matters. The State resisted Reis's Motion. A brief hearing was held on that Motion st the dispositional conference on May 6, 2013. Reis's Motion to Suppress was summarily denied by the District Court on May 7, 2013, with the district court referencing and incorporating the Order Denying Motion to Suppress from Burleigh Co 08-2012-CR-02377 (now on appeal as Supreme Court 20130193). Reis entered a conditional plea of guilty to the charges on June 10, 2013. Reis was sentenced on June 10, 2013 and a Criminal Judgment was entered on June 14, 2013, sentencing Reis to a period of incarceration. Reis appeals from the District Court's denial of his Motion to Suppress and the entry of the Criminal Judgment against him.

STATEMENT OF THE FACTS

[¶4] On or about September 29, 2012, at approximately 8:50 pm, Kendall Vetter, an officer with the Bismarck Police Department, received a call that a pickup truck was driving erratically. (Tr. 3). The call came as a tip from an anonymous unverified source. (Tr. 10). When Vetter arrived, there were two vehicles parked. (Tr. 4). One vehicle drove away, and the remaining vehicle was approached, as it had a license plate number that was identified by dispatch. Id. Vetter did not personally view any poor driving, and indicated that "It was in a parking lot. It was running, I guess." (Tr. 10, line17). Vetter agreed that the vehicle did not seem to have any problems, it appeared operable, no one was in the driver's seat and Reis was in the passenger seat. (Tr. 10). Vetter approached the vehicle, but did not block the vehicle in or turn on his emergency lights. (Tr. 5). Vetter termed his investigation as a "consensual encounter". (Tr. 17). An individual, later identified as Reis, exited the vehicle and informed Vetter that he was throwing away trash. (Tr. 5). Reis deposited his trash in the recycling bin. Id.

[¶5] Vetter walked up to the vehicle, and observed that the door was open and the interior light on. Id. He observed a handgun on several pills on the passenger floorboards of the vehicle. Id. Vetter immediately detained Reis and put him in handcuffs "for safety reasons—with the handgun." (Tr. 6, line 5).

[¶6] Another individual, Jennifer Franco, was also present at the scene. (Tr. 6). Vetter claimed that his impression was that Reis and Franco were both under the influence of a substance. Id. However, Vetter indicated that Franco did have a valid prescription for morphine and other medications. (Tr. 12). Another officer at the scene, Loren Grensteiner, confirmed that Franco indicated she had a prescription but Grensteiner did

not identify any of the pills. (Tr. 29). Grensteiner was told by another officer at the scene, David Johnson, that the pill was a controlled substance, but Grensteiner did not validate Franco's prescription until several days later, long after the search was completed. (Tr. 31).

[¶7] Vetter checked records for Reis and Franco, and determined that neither individual had a permit to carry a gun or concealed weapon. (Tr. 12). However, Vetter admitted that neither individual would need a permit if the gun was visible, and the gun was in plain view with the door of the vehicle open, as in this scenario. (Tr. 12-13). Vetter could not tell if the gun was loaded or not, and even though a magazine was in the chamber, there were no bullets and neither individual was charged with illegally carrying a firearm. (Tr. 13, 18-19). The only items in plain view were the gun and the several pills on the floorboards. (Tr. 14). The fact that the gun was in plain view was corroborated by another officer at the scene, David Johnson. (Tr. 22). All of the pills except one "were just over the counter medications or vitamins" and after it was seized, one pill was later identified as a controlled substance by. (Tr. 23, line 1 et seq.). However, the search and seizure of the gun and other items had already been completed by Vetter. (Tr. 24).

[¶8] Vetter did not ask for permission to search the vehicle, but simply ascertained the owner of the vehicle. (Tr. 14). Vetter then searched the vehicle and located the handgun, the several pills in view, a hard case with many pills, a black case with paraphernalia, a laptop bag with a scale with residue, other pill cases and marijuana paraphernalia. (Tr. 7-8). In addition, Vetter located a locked box in the backseat. (Tr. 8). Vetter forced the locked box open, later testifying that "It was a combination box and we eventually just

popped – I popped the lock on the box." (Tr. 9, lines1-2). Although Vetter claimed that he did not damage the box, the box was locked and he did have to force it open. (Tr. 9). The lock was turned so that the box was locked, force was used to enter the box and the only justification was that it was part of the search of the vehicle without consent. (Tr. 15). Inside that box were more pills. (Tr. 9).

[¶9] As a result of the encounter, Reis was arrested and charged in Burleigh County with several felony counts dealing with controlled substances. Reis maintains that law enforcement illegally searched the vehicle, without a warrant and without sufficient probable cause or other justification to overcome any presumption against a warrantless search. Further, as a result of statements made subsequent to the search, Reis was charged in Morton County with Burglary and Theft of Property. Reis maintains that the information gathered and used to charge him constitutes "Fruit of the Poisonous Tree" and was illegally gained from the illegal search

ARGUMENT

STANDARD OF REVIEW

[¶10] This Court has jurisdiction under N.D. Const. Art. VI, §§ 2 and 6, to have appellate jurisdiction and act as a court of appeals, and under N.D.C.C. § 29-28-06 to review an order denying the suppression of evidence. When reviewing a district court's ruling on a motion to suppress, this Court defers to the district court's findings of fact and resolves conflicts in testimony in favor of affirmance. City of Grand Forks v. Zejdlik, 551 N.W.2d 772, 774 (N.D.1996) (citing City of Grand Forks v. Egley, 542 N.W.2d 104 (N.D.1996)). This Court affirms the district court's decision unless, after resolving conflicting evidence in favor of affirmance, this Court concludes there is insufficient

competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence. City of Fargo v. Thompson, 520 N.W.2d 578, 581 (N.D.1994) (citations omitted). Questions of law are fully reviewable. State v. Zimmerman, 529 N.W.2d 171, 173 (N.D.1995) (citations omitted).

LAW AND ARGUMENT

[¶11] The District Court improperly denied Reis's Motion to Suppress the Search of the Vehicle.

> The Fourth Amendment to the United States Constitution provides that:
>
> > [T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. The Fourth Amendment has been made applicable to the activities of state law enforcement officials by virtue of the Fourteenth Amendment to the United States Constitution. Mapp v. Ohio, 367 U.S. 643 (1961). Likewise, the North Dakota Constitution mandates:

> > The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

N.D. Const. Art. I, § 8. The North Dakota Supreme Court has held that:

> > The Fourth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, and Article I, Section 8 of the North Dakota Constitution, protect individuals from unreasonable searches and seizures. Warrantless searches are unreasonable unless they fall within a recognized exception to the requirement for a search warrant.

State v. Wanzek, 1999 ND 163, ¶7, 598 N.W.2d 811, 813 (citations omitted).

[¶12] In the case before the Court, law enforcement did not stop the vehicle Reis was a passenger in, but approached the vehicle in a community caretaking manner. The suspicion of law enforcement to approach may have been justified, but the subsequent search was not.

There was no warrant to justify the search.

[¶13] Reis maintains that there was no legitimate reason that would give law enforcement the requisite reasonable and articulable suspicion to approach his vehicle and then search without a warrant, or valid exception to a warrant. The North Dakota Supreme Court recently reviewed the issue of reasonable and articulable suspicion in precisely this type of encounter:

> Permissible types of law enforcement-citizen encounters include: (1) arrests, which must be supported by probable cause; (2) Terry stops, see Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), seizures which must be supported by a reasonable and articulable suspicion of criminal activity; and (3) community caretaking encounters, which do not constitute Fourth Amendment seizures. See State v. Boyd, 2002 ND 203, ¶ 6, 654 N.W.2d 392; State v. Halfmann, 518 N.W.2d 729, 730 (N.D.1994). Under Terry, police may, in appropriate circumstances and in an appropriate manner, detain an individual for investigative purposes when there is no probable cause to make an arrest if a reasonable and articulable suspicion exists that criminal activity is afoot. Anderson v. Director, N.D. Dept. of Transp., 2005 ND 97, ¶ 8, 696 N.W.2d 918. We have said an officer has reasonable and articulable suspicion to stop a vehicle: (1) when the officer relied on an appropriate directive or request for action from another officer; (2) when the officer received tips from police officers or informants, which were then corroborated by the officer's own observations; or (3) when the officer directly observed illegal activity. Id.

State v. Torkelson, 2006 ND 152, ¶¶ 10-11, 718 N.W.2d 22, 26. Reis does not claim that law enforcement could not approach to investigate, but Reis does claim that the subsequent search of the vehicle without a warrant was in violation of his rights.

Law Enforcement Did Not Have or Develop Probable Cause
to Search Without a Warrant Under the Automobile Exception

[¶14] Reis was in the passenger seat and the driver of the vehicle was out of the vehicle when law enforcement approached. There was no circumstance that would necessitate a search under exigent circumstances, such as officer safety or destruction of evidence, as Reis was immediately handcuffed. (Tr. 6). In an analysis of whether an emergency actually existed, this Court has directed that "[w]e use an objective standard in evaluating an officer's reasonable belief." State v. Huber, 2011 ND 23, ¶ 14, 793 N.W.2d 781, citing *Nelson*, 2005 ND 11, ¶ 12, 691 N.W.2d 218. Upon inquiry, Reis informed law enforcement that everything was fine and their presence was not needed. Upon locating the driver of the vehicle, law enforcement determined that she did not need any emergency assistance either. There was no reasonable belief on anyone's part that any emergency or exigent circumstances existed. Law enforcement's inquiry should have ended there.

[¶15] In this circumstance law enforcement needed to have or develop probable cause to validly search the vehicle without a warrant.

> Under the Fourth Amendment, the government must obtain a warrant before conducting a search when a person has a reasonable expectation of privacy, unless the search falls within a recognized exception to the warrant requirement. *State v. Dudley*, 2010 ND 39, ¶ 7, 779 N.W.2d 369 (citing *State v. Gregg*, 2000 ND 154, ¶ 23, 615 N.W.2d 515). A recognized exception to the requirement is the automobile exception, which allows law enforcement officers to search a vehicle for illegal contraband without a warrant upon establishing probable cause the vehicle contains contraband. *Id.* (citing *State v. Zwicke*, 2009 ND 129, ¶ 9, 767 N.W.2d 869).

State v. Gefroh, 2011 ND 153, ¶ 8, 801 N.W.2d 429. Thus, law enforcement needed to have or needed to develop probable cause to validly search the vehicle without a warrant.

[¶16] In the present case, even though law enforcement received a directive from

dispatch, law enforcement did not observe any illegal activity. The directive was simply to investigate, not to arrest or resolve a situation. There was no tip from any officers or informants that there was illegal activity happening. Law enforcement did not observe any illegal activity. Thus, even if the encounter was deemed a 4th Amendment stop, law enforcement did not even have the requisite reasonable suspicion to conduct a stop.

[¶17] The gun that was viewed was not investigated to see if it was legally owned. The gun was not concealed, but was in plain view. There is nothing illegal about such activity and no permit is needed. The pills that were observed on the floor of the vehicle were claimed by the driver of the vehicle, and she indicated she possessed a legal prescription. Again, there is nothing illegal about this activity. There was no consent to search, no dog sniff, no odor of marijuana or any other indicia of the presence of illegally possessed controlled substances. Law enforcement had no valid reason to search the vehicle further than plain view allowed. Simple questions as to whose pills were present and if that person had a valid prescription for the pills would have easily resolved the issue of legality of their presence. Law enforcement however jumped straight to the search. The presence of a gun in plain view and several pills, not identified as a controlled substance, does not give law enforcement probable cause to search a vehicle without permission and without a warrant.

There Was No Valid Search Incident to Arrest

[¶18] The holding in Wanzek, cited above, was that, *after a valid arrest*, the compartment of a vehicle may be searched. State v. Wanzek, 1999 ND 163, ¶ 18, 598 N.W.2d 811. See also State v.Hensel, 417 N.W.2d 849 (N.D.1988). The Court in Wanzek cited the US Supreme Court case of New York v. Belton, 453 U.S. 454, (1981),

as the guidepost for automobile searches. Wanzek at ¶ 8-16. In Belton, an individual was stopped for speeding, and upon stopping the vehicle, "[t]he officer saw an envelope on the vehicle's floor which he associated with marijuana and he could smell burnt marijuana." Id. at ¶ 11. *Only after the individual was arrested could the officer search the vehicle*. Id. However, that envelope *in plain view*, along with the officer's testimony of an odor of marijuana, *may have* given probable cause to search the vehicle.

[¶19] Reis does not dispute that, had he been properly arrested, law enforcement might have been able to legally search his vehicle incident to arrest. However, the undisputed facts of the case show that Reis was not yet under arrest, so there was no valid search incident to arrest.

Law Enforcement Did Not Have Consent Or Probable Cause to Search Closed Containers Located Within the Vehicle.

[¶20] In conducting an illegal search, law enforcement searched closed containers and broke into a locked container in the vehicle without consent and without a warrant. Such an act is a violation of the Fourth Amendment, and is an unjustifiable intrusion into the driver's and the passenger's right to and reasonable expectation of privacy. Without consent or a warrant, the search of the locked box was an illegal search. Florida v. Jimeno, 500 U.S. 248 (1991). Jimeno was cited with approval in North Dakota, but was distinguished from the citing case as consent had been given to search. State v. Odom, 2006 ND 209, 722 N.W.2d 370. No such consent was given here.

[¶21] After being stopped, Reis and the driver of the vehicle made certain statements to law enforcement that can be deemed incriminating and indeed caused more criminal charges for Reis in Morton County, the subject of which formulate this appeal. Law enforcement discovered alleged controlled substance and paraphernalia from that search.

Reis maintains that the vehicle was searched without proper development of probable cause to do so. Even though perhaps voluntary under Miranda, had Reis not been illegally stopped, the search and the statements never would have occurred. Reis requests that any statements made be suppressed as well as "fruit of the poisonous tree." State v. Nickel, 2013 ND 155, ¶ 26, 836 N.W.2d 405.

[¶22] Without a legal stop, all of the evidence against Reis pertaining to all of the included charges should be suppressed. As such, all information from the search of the vehicle should be suppressed, as well as any and all statements made.

CONCLUSION

[¶23] For all of the above-mentioned reasons, there was no reasonable suspicion to search Reis or Reis's vehicle, and law enforcement lacked any probable cause or warrant to search Reis's vehicle. Reis requests that all evidence, including any statements by any individual at the scene, must be suppressed.

Dated this Wednesday, October 23, 2013.

/s/_____
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court No. 20130192
	)	
Plaintiff/Appellee,	)	District Court No. 30-2013-CR-00002
	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
Cory Reis,	)	
	)	
Defendant/Appellant.	)	

Steven Balaban, the attorney for Appellant in the above action, hereby certifies under N.D.R.Civ.P. 5(f), that on Wednesday, October 16, 2013, he served the attached:

BRIEF OF APPELLANT REIS
and **APPENDIX TO BRIEF OF APPELLANT REIS**

upon Gabrielle Goter, Morton County Assistant States Attorney, attorney for Plaintiff and Appellee, State of North Dakota, by e-mail to the address gabrielle.goter@mortonnd.org and mortonsa@mortonnd.rg as listed on the North Dakota Supreme Court Website on October 16, 2013.

/s/_____
Steven Balaban

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court No. 20130192
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Plaintiff/Appellee,	)	District Court No. 30-2013-CR-00002
	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
Cory Reis,	)	
	)	
Defendant/Appellant.	)	

Steven Balaban, the attorney for Appellant in the above action, hereby certifies under N.D.R.Civ.P. 5(f), that on Wednesday, October 24, 2013, he served the attached:

AMENDED APPENDIX TO BRIEF OF APPELLANT REIS

upon Gabrielle Goter, Morton County Assistant States Attorney, attorney for Plaintiff and Appellee, State of North Dakota, by e-mail to the address gabrielle.goter@mortonnd.org and mortonsa@mortonnd.rg as listed on the North Dakota Supreme Court Website on October 16, 2013.

/s/_____
Steven Balaban

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court No. 20130192
	)	
Plaintiff/Appellee,	)	District Court No. 30-2013-CR-00002
	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
Cory Reis,	)	
	)	
Defendant/Appellant.	)	

Steven Balaban, the attorney for Appellant in the above action, hereby certifies under N.D.R.Civ.P. 5(f), that on Wednesday, October 24, 2013, he served the:

BRIEF OF APPELLANT REIS
and **AMENDED APPENDIX TO BRIEF OF APPELLANT REIS**

upon Cory Reis, Defendant/Appellant, by US Mail to his last known address of:

Cory Reis
North Dakota Penitentiary
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Bismarck, ND 58506-5521

/s/_____
Steven Balaban