

IN THE SUPREME COURT OF NORTH DAKOTA

December 11, 2013

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State of North Dakota,	)	
	)	
Plaintiff and Appellee,	)	
	)	Supreme Court No. 20130290
v.	)	
	)	District Ct. No. 09-2012-CR-04235
Todd Michael Zeller,	)	
	)	
Defendant and Appellant.	)	
	)	
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APPEAL FROM THE DISTRICT COURT  
 CASS COUNTY, NORTH DAKOTA  
 EAST CENTRAL JUDICIAL DISTRICT  
 THE HONORABLE JOHN C. IRBY, PRESIDING

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**BRIEF OF APPELLANT**

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### **[¶ 3] STATEMENT OF THE ISSUES**

- I. Whether the search warrant was issued without probable cause in violation of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution.**
- II. Whether the affidavit in support of the search warrant was false and misleading in violation of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution regardless of whether the search warrant was facially supported by probable cause.**
- III. Whether the nighttime search provision of the search warrant was granted without probable cause in violation of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution and other provisions of state law regardless of whether there was probable cause to issue the warrant itself.**

### **STATEMENT OF THE CASE**

[¶ 4] This is an appeal from the judgment of conviction entered in Cass County District Court on September 3, 2013 before the Honorable John Irby after a conditional guilty plea. (Appendix (“App.”) at 27, 30-33). The Appellant Todd Zeller specifically reserved his right to appellate review of the adverse rulings on his motions to suppress. (App. at 28).

[¶ 5] Detective Witte of the Fargo Police Department obtained a warrant to search Zeller’s home on November 17, 2013. (App. at 13-17). The warrant allowed for a nighttime search. (App. at 13). Police officers searched Zeller’s home less than an hour after receiving the warrant and obtained incriminating evidence. (App. at 7-9). As a result of the search, the State of North Dakota filed criminal information on November 19, 2013 charging Zeller, with numerous controlled substance crimes including nine felonies. (App. at 7-9).

[¶ 6] On January 14, 2013, Zeller filed a motion to suppress arguing that the

search warrant was not supported by probable cause. (App. at 10-11). Alternatively, the motion argued that even if the court were to determine probable cause had been established to support the warrant generally, the warrant's nighttime provision was not supported by probable cause. Id.

[¶ 7] On May 7, 2013, the district court presided at a hearing on the motion to suppress. (App. at 5, 18; Transcript of May 7, 2013 motion hearing ("5/7/13 Tr.") at 3). During the hearing, the State called Det. Witte to testify and offered the search warrant together with its supporting documents as an exhibit. (App. at 12-17; 5/7/13 Tr. at 6-7).

[¶ 8] Although the search warrant claimed nighttime service would be safer for the people inside the home as well as law enforcement, Witte testified that he did not seek permission to serve the warrant at night for safety reasons, and he admitted that nighttime warrants do not provide additional safety in his view. (5/7/13 Tr. at 11-13, 16). Furthermore, he agreed nighttime service can even heighten the danger of the search. (5/7/13 Tr. at 11-13, 16-17). Witte also admitted that when he requested the warrant, he did not disclose that his confidential informant was a criminal working to gain favorable treatment despite the fact that he knew this was a relevant consideration. (App. at 15-16; 5/7/13 Tr. at 25-29).

[¶ 9] Following the motion hearing, Zeller and the State filed post-hearing briefs on May 28, 2013 and June 4, 2013 respectively. (App. at 5). The court issued a written order denying Zeller's motion on June 7, 2013. (App. at 18-23).

[¶ 10] Zeller filed another motion to suppress on July 12, 2013. (App. at 24). This second motion claimed Witte misled the magistrate to obtain the search warrant and included a request for a Franks hearing. Id. The parties appeared for oral argument

on the motion on July 29, 2013. (App. at 25). No additional testimony was presented. (Transcript of July 29, 2013 motion hearing (“7/29/13 Tr.”) at 3-10). After oral argument, the court denied Zeller’s July 12th motion on the record. (7/29/13 Tr. at 10-11). The court filed a written order on August 5, 2013. (App. at 25-26).

[¶ 11] On September 3, 2013, Zeller entered a conditional guilty plea reserving his right to appellate review of the district court’s adverse rulings on his motions to suppress. (App. at 28). He was sentenced on that same day, and this appeal followed. (App. at 30-38).

## **STATEMENT OF THE FACTS**

### **The Origin of the Charges**

[¶ 12] During the early morning hours of November 17, 2012, Detective Witte of the Fargo Police Department applied for a warrant to search the home of Todd Zeller. (App. at 12). A judge signed the warrant at 3:25 a.m., and authorized a nighttime search at Witte’s request. Id. When the warrant was executed at 4:05 a.m. that same day, law enforcement obtained numerous incriminating items and statements. (App. at 7-9). Consequently, Zeller was arrested and charged with numerous felony drug crimes. (App. at 7-9).

### **The Search Warrant**

[¶ 13] Witte’s affidavit supporting the search warrant made numerous claims about Zeller’s possible drug dealing activity. (App. at 15-17). He specifically addressed information obtained in three separate timeframes including: “late 2010 or early 2011,” July of 2012, and November 16, 2012. Id. His affidavit addressed each timeframe in chronological order. Id.

[¶ 14] First, Witte claimed that in late 2010 or early 2011 he received information

regarding Zeller and Lisa Foulkes being involved in the distribution of methamphetamine. (App. at 15). Witte did not elaborate on the source of this information or its substance. Id. In any case, he opened an investigation then closed it when he was unable to corroborate the information he received. Id. He did, however, determine that Zeller and Foulkes were living at 114 24<sup>th</sup> Street South in Fargo. Id.

[¶ 15] The second timeframe addressed in Witte's affidavit was July of 2012. (App. at 15). At that time, Witte purportedly began receiving multiple complaints on the narcotics tip line from a person he referred to as a "concerned citizen." Id. Despite this characterization as a "concerned citizen," the affidavit acknowledged that Witte did not know the informant's identity or whether the informant was reliable. Id. This anonymous informant, who claimed to live in the "area of 114 24<sup>th</sup> Street South," reported a "high volume of short stay, come and go traffic" from 114 24<sup>th</sup> Street South. Id. The unspecified "activity," which, for some unexplained reason, the informant believed to be related to drug dealing, involved cars with out-of-state plates and was alleged to have occurred in the unattached garage. Id. When asked to provide license plates numbers for some the cars observed in the area, the informant provided five plate numbers. (App. at 15). Witte traced two of the license plates to Jason Gust and Julian Bernath. Id. According to his affidavit, Jason Gust and Julian Bernath are meth users. Id. Based on this anonymously furnished information, Witte reopened his investigation of Zeller and Foulkes. Id.

[¶ 16] Finally, Witte's affidavit addressed the events of November 16, 2012. (App. at 15-16). On that day, Witte and two other officers orchestrated a controlled purchase of methamphetamine from John Louis Gust, not to be confused with Jason



Gust, using a person he identified only as a confidential informant (“CI”). Id. The money used in the controlled buy was recorded. (App. at 15). According to Witte:

After this transaction, Gust drove the CI to the 200 block of 24<sup>th</sup> Street South and parked. At approximately 10:35 p.m. Gust told the CI he was going to meet his “dealer” to obtain more methamphetamine. Gust exited the vehicle and walked on foot to an unknown location. A short time later, Detective Christensen observed Gust in the alley immediately behind 114 24<sup>th</sup> Street South. Gust returned to the vehicle and he and the CI left the area. Gust eventually drove the CI to a local bar and dropped them off. Your Affiant picked up the CI and obtained the methamphetamine and audio recording/transmitting device. A Nik field test was eventually conducted on the substance obtained from Gust and it field tested positive for methamphetamine.

Detective Christensen had a marked patrol unit conduct a traffic stop on Gust. Gust was placed under arrest for delivery of methamphetamine with 1000 feet of a school or daycare (AA Felony). Both the passengers in the vehicle were arrested on outstanding arrest warrants. A probable cause search was conducted on Gust’s vehicle and more methamphetamine and drug paraphernalia were located. The recorded buy fund money was not recovered from Gust or any of the other occupants of the vehicle. Detective Christensen also searched Gust’s phone incident to his arrest and located a recent text message from “Todd Z” with the phone number (701) 238-1993 asking Gust if he was close to the area. Your Affiant checked Fargo Police records and determined this phone number comes back to Todd Michael Zeller of 114 24<sup>th</sup> Street South.

(App. at 15-16).

[¶ 17] In his warrant request, Witte sought special permission to execute the warrant at night. (App. at 16-17). Specifically, Witte requested the following:

**Special Request For Night Time Service Authorized**

Your Affiant further would like to request “Nighttime Service Authorized” to allow officers the ability to get closer to the residence before being detected under the cover of darkness. Your Affiant notes that entry of law enforcement in this manner will be safer to those inside as well as the law enforcement officers executing the search warrant. Your Affiant notes this methamphetamine transaction occurred between the hours of 10 p.m. and 11 p.m. and the investigation is ongoing. Your Affiant notes this information was developed in the late hours of November 16<sup>th</sup> and early morning hours of November 17, 2012.

(App. at 16) (Emphasis added). Witte's request to serve the warrant at night was granted, and pursuant to that provision he executed the warrant at 4:05 a.m. (App. at 13; 5/7/13 Tr. at 9).

### **The First Motion to Suppress**

[¶ 18] Zeller filed a motion to suppress and a supporting brief on January 14, 2013. (App. at 4, 10-11). Zeller's motion claimed that the search warrant was not supported by probable cause. (App. at 10). Furthermore, the motion argued that even if there was probable cause to issue the warrant, there was not probable cause to support the nighttime search provision. *Id.* The State filed a response on February 6, 2013. (App. at 4). Witte was deposed on February 26, 2012, and the parties appeared for an evidentiary hearing May 7, 2013. (App. at 5; 5/7/13 Tr. at 3, 8). Witte was the sole witness at the hearing. (5/7/13 Tr. at 2, 6-33). The sole exhibit offered at the hearing was the search warrant, which was offered and received as Exhibit 1. (App. at 12-17; 5/7/13 Tr. at 6-7).

### **The May 7, 2013 Motion Hearing**

[¶ 19] On May 7, 2013, the parties appeared for a hearing on Zeller's motion to suppress. (5/7/13 Tr. at 3). The State called Detective Witte and asked just enough questions to authenticate the search warrant in question, which was offered and received as Exhibit 1. (5/7/13 Tr. at 6-7).

[¶ 20] Witte's testimony on cross-examination revealed a number of significant facts. First, although the search warrant application claimed nighttime service would be safer, Witte testified safety was not the reason he asked for nighttime authorization, and he admitted that he does not actually believe executing a warrant at night is safer than doing so during daylight hours. (5/7/13 Tr. at 11-13, 16). Second, Witte admitted that he

was aware that officers cannot simply rely on “canned language” to justify a request for nighttime service, but the evidence suggested he did so anyway. (5/7/13 Tr. at 14). Third, Witte had no specific reason to suspect that nighttime service was necessary to prevent the loss of evidence. (5/7/13 Tr. at 20, 23-24). Fourth, Witte’s CI was an unproven, criminal informant and although he was aware that judges apply additional scrutiny to criminal informants, he chose not to disclose that information in his warrant application. (5/7/13 Tr. at 27-29).

### **Safety and Nighttime Search Warrants**

[¶ 21] Although Witte listed a number of assertions in his request to serve the warrant at night, his stated justification for that request was that nighttime service would “allow officers the ability to get closer to the residence before being detected under the cover of darkness,” which would be “safer to those inside as well as the law enforcement officer executing the search warrant.” (App. at 16). While he testified that “some people would have the opinion that serving a warrant at night would give you the cover of darkness, and aid your ability to be safe...” Witte’s testimony demonstrated that he is not one of those people. (5/7/13 Tr. at 11-12) (Emphasis added). It should also be noted that although nighttime service was authorized, the warrant still required officers to knock and announce their presence, which, from a logical standpoint, would seem to defeat any perceived benefit of sneaking up on the residence. (App. at 13).

[¶ 22] Witte admitted that safety concerns are not a reason for a nighttime warrant. (5/7/13 Tr. at 11). Although he had to be confronted with the transcript of his sworn testimony at his February 26, 2013 deposition from time to time, he also admitted that, in and of itself, searching at night does not provide enhanced safety and that

nighttime service can actually heighten the danger. (5/7/13 Tr. at 11-13, 16). During cross-examination, Witte was forced to admit that he honestly testified that nighttime search provisions are unrelated to safety during his deposition, but he also confirmed that nighttime warrants are not about safety even when he was free to elaborate during redirect. (5/7/13 Tr. at 30-31). The following excerpt from redirect is illustrative:

Q Mr. Lange asked you some questions earlier this afternoon about safety concerns when you're seeking nighttime or a no-knock warrant. He cut you off when you tried to explain exactly your position on that. What's your position on safety? How does that factor into no-knock or nighttime search warrants?

A Well, as I view them, they're completely independent of each other. A nighttime search warrant has to do with exactly that. When the search warrant will occur.

A no-knock search warrant deals more with safety and the need to make entry without announcing our presence, so as to be able to better protect our self, or the person has shown previously that they're previously disposed to destroying evidence.

In this case, it was simply a nighttime search warrant. The investigation was ongoing through the night. I had no information related to Mr. Zeller being armed, being dangerous, or specifically that showed exigent circumstances where he would destroy evidence.

However, I do have an indication that Mr. Zeller is continuing his criminal activities at night, which leads me to conclude that if he has x-amount of narcotics in his residence for sale, if he continues selling throughout the night, I have no idea what's going to be left when I execute the search warrant. Whether it be at 4:00 o'clock, 5:00 o'clock, 8:00 o'clock, 10:00 o'clock the next day. Which is the primary reason we continued through the night with this search warrant.

(5/7/13 Tr. at 30-31) (Emphasis added).

### **“Canned Language”**

[¶ 23] On more than one occasion, Witte conveyed his understanding that a request for a nighttime search must be supported by “specific facts tailored to the individual situation.” (5/7/13 Tr. at 10, 14). He also agreed that an officer may not simply rely on “canned language” to support a request for a nighttime authorization.

(5/7/13 Tr. at 14). In fact, Witte was aware of a specific case where “canned language” led to suppression, though perhaps not before he applied for the warrant in this case. (5/7/13 Tr. at 14-15). Nevertheless, it appears Witte included so-called “canned language” to justify his request for nighttime service.

[¶ 24] As mentioned previously, the affidavit in support of the Zeller search warrant expressed the desire to approach the residence “under cover of darkness,” which he claimed would make things safer for the people inside the home as well as the officers. (App. at 16). Significantly, Witte used the “cover of darkness” language when articulating one theory on nighttime search warrants during the May 7, 2013 hearing. (5/7/13 Tr. at 11-12). However, as discussed previously, this is not a theory that Witte ascribes to himself, and he had no reason to think Zeller or Foulkes were dangerous when he applied for the warrant. (5/7/13 Tr. at 11-13, 16, 30-31). Since this alleged concern about safety obviously had nothing to do with Zeller’s case, and since Witte does not personally ascribe to the “cover of darkness” theory, his justification for the nighttime warrant must be considered “canned language.”

#### **No Reason to Fear a Loss of Evidence without Nighttime Search**

[¶ 25] During his testimony, Witte claimed to be concerned that evidence could be lost without nighttime service. (5/7/13 Tr. at 19). However, he admitted several times that he had no facts specific to Zeller’s case that would suggest evidence would be lost simply by waiting for daylight. (5/7/13 Tr. at 20, 23, 24).

[¶ 26] Based on his testimony, there are reasons to question whether Witte was genuinely concerned about losing evidence. Perhaps most significantly, he did not even mention such a concern to within his affidavit. (App. at 16-17). Furthermore, he left the

residence unguarded while he applied for the warrant, which seems like a strange thing to do if he was really worried about evidence disappearing during the night. (5/7/13 Tr. at 19-20, 31-32).

[¶ 27] Because the buy money was not recovered from John Gust, Witte concluded that the money must be at Zeller's residence, and he testified that he was concerned that that money could be spent if he did not conduct a nighttime search. (5/7/13 Tr. at 19, 31-32). Despite that alleged concern, Witte left the residence largely unmonitored from sometime between 10:25 p.m. and 12:00 a.m. until the warrant was executed at 4:05 a.m. (5/7/13 Tr. at 19-20). This fact belies Witte's alleged concerns. Without some evidence to the contrary, common sense dictates that it was much more likely that any buy funds in Zeller's possession would be spent between 10:25 p.m. and 4:00 a.m. rather than between 4:00 a.m. (the time of the search) and 6:00 a.m. (the time when officers may search without nighttime authorization).

[¶ 28] Although Witte claimed some of the buy fund money did turn up at Zeller's home, his conclusion that the money had to be at Zeller's home was nevertheless questionable at the time he drafted the warrant. On redirect Witte testified as follows:

Q You mention in your application for the search warrant, the recorded buy fund money was not recovered from Gust or any of the other occupants of the vehicle. What significance did that have in this case?

A Well, as the CI indicated to Detective Christensen, Mr. Gust indicated that he was going to meet up with his dealer or his source of narcotics. When Mr. Gust was stopped he did not have the buy fund money on him nor did either of the two occupants. The only location that we followed Mr. Gust to was the vicinity of Mr. Zeller's residence. The only other stops that they made were at drive-thru restaurants. They didn't -- none of the occupants left the vehicle. Therefore, if we've had Mr. Gust's activities under surveillance constantly, and he and the other two occupants of the vehicle did not have the buy fund money, one can logically conclude that it would be at Mr. Gust's last known stop, which was in the vicinity of Mr. Zeller's residence.

(5/7/13 Tr. at 31-32) (Emphasis added). Apparently, Witte ignored the possibility that the money had been spent at the drive through. Furthermore, Witte's own affidavit indicates Gust stopped at a local bar to drop off the CI after the controlled buy. (App. at 15).

### **Withholding of the CI's Status as a Criminal Informant**

[¶ 29] Witte's CI was a criminal informant who had been arrested for drug-related felonies. (5/7/13 Tr. at 25). She was cooperating with law enforcement to get a better deal on her case, and the controlled buy from John Gust was her first. (5/7/13 Tr. at 25-26). Witte did not include this information about his CI in his warrant request. (App. at 15-16). When asked if he was aware that courts apply higher levels of scrutiny to criminal informants than other types of informants, Witte was evasive. Nevertheless, confronted with his deposition testimony, he did admit that he was aware of this enhanced scrutiny for criminal informants and for informants not proven to be reliable. (5/7/13 Tr. at 27-29). Despite this knowledge, Witte's affidavit in support of the Zeller search warrant did not disclose that the CI was cooperating to gain favorable treatment on a felony drug charge, nor did his affidavit disclose that the CI had not yet proven reliable. (App. at 12-17).

[¶ 30] Following the motion hearing, Zeller and the State filed post-hearing briefs on May 28, 2013 and June 4, 2013 respectively. (App. at 5). The court issued a written order denying Zeller's motion on June 7, 2013. (App. at 18-23). According to the court, "[b]ased on the language in the warrant and the totality of the circumstances, there was probable cause for the warrant." (App. at 20). Regarding the nighttime search provision the court explained:

[T]he nighttime provision was supported by probable cause based on the fact the investigation was ongoing, and that more drugs could be lost or sold, and that the money can change hands quickly. The affidavit described one controlled buy, and the money was not there. The officers did not believe they could wait until morning, based on the ongoing business that may be occurring, and based upon the sale earlier that night.

(App. at 21-22). Of the fact that Witte cited safety concerns to support the nighttime provision the court said that, “given the facts set forth in the affidavit and application for search warrant the magistrate could have reasonably concluded that there was also a strong likelihood that the evidence, money, would be gone if the warrant was not immediately served...” Id.

### **The Second Motion to Suppress**

[¶ 31] Zeller filed another motion to suppress on July 12, 2013. (App. at 24). This second motion claimed Witte misled the magistrate to obtain the search warrant and included a request for a Franks hearing. Id. Specifically, Zeller argued that Witte affirmatively misled the magistrate who issued the warrant by claiming a nighttime search would enhance safety. (Transcript of July 29, 2013 motion hearing (“7/29/13 Tr.”) Tr. 4-5). Zeller also claimed Witte misled the magistrate by failing to disclose the fact that his CI was a criminal cooperating to obtain favorable treatment and by failing to disclose that Gust had stopped at a drive through where money could have been spent before officers stopped, searched, and arrested him. (7/29/13 Tr. 5-6, 8-9). The parties appeared for oral argument on the motion on July 29, 2013. (App. at 25). No additional testimony was presented, but Zeller’s arguments were premised on Witte’s testimony at the May 7, 2013 motion hearing. (7/29/13 at 3-10). After oral argument, the court denied Zeller’s July 12th motion on the record. (7/29/13 Tr. at 10-11). The court filed a written order on August 5, 2013. (App. at 25-26).



[¶ 32] On September 3, 2013, Zeller entered a conditional guilty plea reserving his right to appellate review of the adverse rulings on his motions to suppress. (App. at 28). He was sentenced on that same day, and this appeal followed. (App. at 30-33, 38).

### **JURISDICTIONAL STATEMENT**

[¶ 33] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI, § 8 and N.D.C.C. § 27-05-06(1). This Court has jurisdiction over this appeal under N.D. Const. art. VI, § 6, N.D.C.C. § 29-28-06(2) and N.D.R.Crim.P. 11(a)(2). This appeal is timely under N.D.R.App.P. 4(b)(1)(A).

### **LAW & ARGUMENT**

[¶ 34] When reviewing the disposition of a motion to suppress, this Court defers to the trial court's findings of fact and resolves conflicts in testimony in favor of affirmance. State v. Kitchen, 1997 ND 241, ¶ 11, 572 N.W.2d 106 (N.D. 1997). However, whether findings of fact meet a legal standard is a question of law subject to de novo review. Id. at ¶ 12.

#### **I. The search warrant was issued without probable cause in violation of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution.**

[¶ 35] The Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution prohibit unreasonable searches and seizures. “[P]hysical entry into a home is the chief evil against which the wording of the Fourth Amendment is directed.” State v. Keilen, 2002 ND 133, ¶ 11, 649 N.W.2d 224 (quoting Payton v. New York, 445 U.S. 573, 585 (1980)). A warrant must be supported by probable cause. “[P]robable cause to search exists if it is established that certain identifiable objects are probably connected with criminal activity and are probably to be

found at the present time at an identifiable place.” State v. Roth, 2004 ND 23, ¶ 7, 674 N.W.2d 495 (quoting State v. Ringquist, 433 N.W.2d 207, 212 (N.D. 1988)). This Court has adopted the totality of circumstances approach to review whether information presented to a magistrate was sufficient to support a finding of probable cause. State v. Holzer, 2003 ND 19, ¶ 10, 656 N.W.2d 686 (citing State v. Rangeloff, 1998 ND 135, ¶ 16, 580 N.W.2d 593).

**A. The confidential informant was not shown to be sufficiently reliable.**

[¶ 36] The determination of probable cause becomes “more difficult when information is presented from an informant.” Holzer, 2003 ND at ¶ 11 (citing State v. Birk, 484 N.W.2d 834, 836 (N.D. 1992)). While North Dakota no longer strictly adheres to the Aguilar-Spinelli test for probable cause, (See Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969)), “[t]he reliability of an informant remains pertinent to a determination of whether or not probable cause exists for the issuance of a warrant based upon that informant’s statement...” Holzer, 2003 ND at ¶ 11 (citing State v. Dahl, 440 N.W.2d 716, 718 (N.D. 1989)).

[¶ 37] This Court has identified several types of informants with “varying degrees of reliability [including]: citizen, confidential, and anonymous.” Roth, 2004 ND at ¶ 11. A magistrate must consider the status of an informant in judging his credibility or reliability. Id. (quoting State v. Ronngren, 361 N.W.2d 224, 227 (N.D. 1985)). A citizen informant is one whose identity is known both to law enforcement and the magistrate asked to issue a warrant. Such an informant volunteers information without wanting anything in return and is not at risk of going to jail. Roth, 2004 ND at ¶ 10 (quoting Rangeloff, 1998 ND at ¶ 4, n.3). Although a citizen informant is presumed

reliable, the reliability of such an informant must still be considered. See Roth, 2004 ND ¶ 10.

[¶ 38] Generally, a confidential informant is one whose identity is known to the officer but not disclosed to the magistrate. Roth, 2004 ND at ¶ 11 (citing State v. Dymowski, 458 N.W.2d 490, 496 (N.D. 1990)). While a higher degree of presumed reliability will be attributed to a confidential informant than to an anonymous informant, whose identity is not known to the investigating officer, a confidential informant differs significantly from a named, citizen informant. Roth, 2004 ND at ¶ 11 (quoting Ronngren, 361 N.W.2d at 227). A named, citizen informant is considered more reliable than a confidential informant. Roth, 2004 ND at ¶ 11. In Dymowski, this Court upheld the finding of probable cause where the police officer “could and did vouch for the [confidential informant’s] veracity.” Roth, 2004 ND at ¶ 13 (quoting Dymowski, 458 N.W.2d at 496). In light of Dymowski, the court explained with regard to the informant in Roth:

Here, Deputy Bitz effectively vouched for the confidential informant’s reliability and veracity in his supporting affidavit. The informant’s veracity and reliability were evaluated in light of his past contact with law enforcement. Deputy Bitz’s affidavit set forth the basis for his belief that the informant’s information was reliable by stating the informant had provided reliable information in the past that had been independently corroborated and resulted in successful state and federal prosecutions. Deputy Bitz also noted the confidential informant had recently provided information leading to the arrest of a narcotics trafficker and had provided reliable information related to other local drug traffickers that had been independently corroborated.

Roth, 2004 ND at ¶ 13.

[¶ 39] This Court has also discussed criminal informants. In doing so, the Court has observed that, “[o]bviously, such people give information for reasons other than the

call of civic duty.” Dahl, 440 N.W.2d at 718 (quoting Rebell, The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards, 81 Yale L.J. 703, 712-713 (1972)). Unlike “information given by an upstanding citizen of the community,” the assertions of a member of the criminal milieu are not cloaked with a presumption of reliability. Dahl, 440 N.W.2d at 718. “Reliability of an informant who is a ‘criminal[], drug addict[], or even pathological liar[]’ must be established.” State v. Donovan, 2004 ND 201, ¶ 9, 688 N.W.2d 646 (citing Holzer, 2003 ND at ¶ 11) (quoting Dahl, 440 N.W.2d at 718).

[¶ 40] In this case, Witte did not attempt to vouch for the CI or any of his sources. In fact, the opposite is true. Of the information obtained in late 2010 or early 2011, Witte specifically pointed out that he was “unable to corroborate any of the information.” (App. at 15). Regarding the information he received in July 2012, Witte disclosed that the “identity and reliability of the concerned citizen is unknown...” Id. The only information he presented to the magistrate that he did not comment on in terms of reliability was the information he received through the November 16, 2012 controlled buy. (App. at 15-16).

[¶ 41] In Roth the officer effectively vouched for the confidential informant by actually demonstrating to the magistrate that the informant was indeed reliable. Roth, 2004 ND at ¶¶ 13-15. The officer did not simply assert that the informant was reliable; he explained why he felt the informant was worthy of belief. Id. Specifically, the informant had shared details in the past that had not only been independently corroborated but had withstood the scrutiny of the court system, resulting in successful state and federal prosecutions. Id. The officer also explained that the informant had

recently provided information leading to an arrest along with additional information that had again been independently corroborated. Id.

[¶ 42] In this case, Witte made no attempt to vouch for any of his sources of information. He did not vouch for the CI's veracity or her reliability. (App. at 15-16). There is no information indicating whether this particular CI had proven herself reliable in the past. Id. During the hearing, it became clear that Witte could not have vouched for his CI even if he wanted to. Indeed, the only information he could have supplied would have been that the CI had not yet proven reliable and that the CI was a member of the criminal milieu. (5/7/13 Tr. at 25-26). Since, Witte did not demonstrate the CI's reliability, probable cause cannot rest upon her assertions.

**B. Even if the confidential informant was shown to be sufficiently reliable, the warrant was still not supported by probable cause.**

[¶ 43] More troubling than the C.I.'s lack of reliability is the fact that, even taken as true, the allegations used to support the search warrant do not amount to probable cause. Because the information arising during late 2010 or early 2011 and during July 2012, were obtained from uncorroborated, anonymous sources not known to be reliable and because that information was stale by the time the search warrant was issued, the only information Witte presented that is even worthy of consideration is the information obtained on November 16, 2012.

[¶ 44] Witte claimed that John Gust, the target of the controlled buy, told the CI that he was going to see his "dealer." (App. at 15). According to Witte, this information was conveyed by the CI and not necessarily confirmed by the audio recording. (5/7/13 Tr. at 22). Later, Gust was seen behind Zeller's address. (App. at 15). When he was eventually stopped he did not have the buy money, but he did have a text message from

Zeller on his phone. (App. at 16). Witte knew but did not disclose that the individuals had stopped at a drive through before they were stopped. (5/7/13 Tr. at 32).

[¶ 45] No one saw Gust enter Zeller's home. (5/7/13 Tr. at 22). No one ever saw Zeller, and prior to the execution of the search warrant there was no evidence that he was even at home. (App. at 15-17; 5/7/13 Tr. at 25). The key piece of evidence seems to be the suggestion that Gust said he was going to see his "dealer," which seems to have come from a member of the criminal milieu. (Tr. at 22).

**II. The affidavit in support of the search warrant was false and misleading in violation of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution regardless of whether the warrant to search Zeller's home is facially supported by probable cause.**

[¶ 46] A search warrant must be supported by probable cause that does not stem from false or misleading information. See Franks v. Delaware, 438 U.S. 154, 155-56 (1978). In Franks, the United States Supreme Court addressed the standard to be applied when it is alleged that the application for a search warrant contains false or misleading statements. 438 U.S. at 155-56. According to the Franks Court:

[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. In order to succeed on a Franks challenge premised on an omission, the defendant must show: "(1) that the police omitted facts with the intent to make, or in reckless

disregard of whether they thereby made, the affidavit misleading,... and (2) that the affidavit if supplemented by the omitted information would not have been sufficient to support a finding of probable cause.” United States v. Lucht, 18 F.3d 541, 546 (8th Cir. 1994)).

**A. Witte falsely cited enhanced safety as the reason for the nighttime service request.**

[¶ 47] Regarding Witte’s request for nighttime service, in his affidavit, he asserted that nighttime service would “allow the officers the ability to get closer to the residence before being detected under the cover of darkness,” which would be “safer to those inside as well as the law enforcement officer executing the search warrant.” (App. at 16). However, this statement in Witte’s affidavit is very different from his testimony about his request to serve the warrant at night. Witte testified that safety concerns are not actually a reason for a nighttime warrant. (5/7/13 Tr. at 11). He also testified that nighttime service does not provide more safety and it can even be more dangerous. (5/7/13 Tr. at 11-13, 16). Witte admitted that he had “no information related to Mr. Zeller being armed, being dangerous, or specifically that showed exigent circumstances where he would destroy evidence.” (5/7/13 Tr. at 30-31).

[¶ 48] Significantly, Witte’s proffered reason for the nighttime search request was knowingly false. Since he articulated no concern about evidence disappearing within his request, his statement about safety was the only proffered justification for nighttime service. Therefore, his false statements about safety were critical to the nighttime search authorization. Without those comments, the request would have been denied.

**B. Witte failed to disclose that his CI was an untested, criminal informant seeking favorable treatment on her own criminal charges, and failed to disclose John Gust’s stop at a drive-through.**

[¶ 49] In addition to the false statement regarding the nighttime search request, Witte omitted key facts from his affidavit. Specifically, Witte failed to disclose that his primary informant was a member of the criminal milieu. (App. at 15-16; 5/7/13 Tr. at 25-26). Moreover, Witte's affidavit strongly implied that the money used in the controlled buy had to be at Zeller's residence since the money was not recovered from Mr. Gust and Gust had been seen near Zeller's home shortly before his arrest. (App. at 15-16). However, during the evidentiary hearing, it was revealed that Mr. Gust had stopped at a drive-through restaurant before he was arrested. (5/7/13 Tr. at 31-32). This fact was also omitted from Witte's affidavit. (App. at 15-16).

[¶ 50] Witte's omissions were at least in reckless disregard for the truth. He admitted that he knew criminal CIs receive more scrutiny from judges. Regarding the status of informants, Witte testified as follows:

Q My question is, is it your practice to disclose if somebody a criminal informant or not?

A My practice is to identify the informant as a cooperating informant, CI in the search warrant. Unless the person is deemed reliable or has done -- provided corroborated information or done work for law enforcement that we have corroborated and deemed to be reliable, I will refer to them as a cooperating informant or a CI. If they have done such other law enforcement controlled buys or provided information that's been corroborated, I will rely (sic) to them as a reliable confidential informant, an RCI. So in any case where I'm writing a search warrant using information provided from a CI, my practice has been to refer to them as a cooperating informant.

(5/7/13 Tr. at 28-29). In light of this statement, it seems Witte does not make it his practice to disclose an informant's status as a criminal.

[¶ 51] There are two significant points to consider with regard to Witte's representations about his usual practice. First, the substance of his own affidavit calls his



claims into question. When Witte feels like disclosing concerns about reliability, he does so. In his affidavit, Witte indicated that he was “unable to corroborate any of the information” supplied in late 2010 or early 2011. (App. at 15). Witte also specifically disclosed that the “identity and reliability of the concerned citizen [was] unknown.” (App. at 15). In other words, the information he relayed about the November 16th controlled buy is the only information he relayed without comment on the reliability of that information or its source. It is worth noting that the events of November 16, 2012 are easily the most meaningful contained in the search warrant application. Second, it is significant that Witte’s standard operating procedure as conveyed on page 29 of the transcript is apparently to withhold vital information about his CIs. That he claims to do so regularly is more of an indictment than a defense. (5/7/13 Tr. at 28-29). Assuming for the sake of argument that the warrant was facially supported by probable cause, it is fair to say that had Witte included his CI’s troubling past or the fact that John Gust stopped at a drive through before he was arrested, the warrant would not have been supported by probable cause.

**III. The nighttime search provision was granted without probable cause in violation of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution and other provisions of state law regardless of whether there was probable cause to issue the warrant itself.**

[¶ 52] Under N.D.R.Crim.P. 41(c)(1)(E), a warrant must be served during the daytime unless, based on reasonable cause, it is authorized to be executed at times other than daytime. “‘Daytime’ means the hours from 6:00 a.m. to 10:00 p.m. according to local time.” N.D.R.Crim.P. 41(h)(2)(B). The terms ‘reasonable cause’ and ‘probable cause’ are interchangeable. State v. Knudson, 499 N.W.2d 872, 875 (N.D. 1993). A

nighttime search warrant “requires a separate showing of probable cause necessitating the need to execute the warrant at a time other than the daytime.” State v. Holly, 2013 ND 94, ¶ 35, 833 N.W.2d 15 (N.D. 2013) (citing State v. Fields, 2005 ND 15, ¶ 9, 691 N.W.2d 233).

[¶ 53] The purpose of N.D.R.Crim.P. 41(c) “is to protect citizens from being subjected to the trauma of unwarranted nighttime searches. Courts have long recognized that nighttime searches constitute greater intrusions on privacy than do daytime searches.” State v. Schmeets, 278 N.W.2d 401, 410 (N.D. 1979). In Fields, this Court discussed nighttime search warrants at some length. According to the Fields Court:

When analyzing what constitutes probable cause for a nighttime warrant, we have previously stated,

Although there may be a variety of circumstances that justify the authorization of a nighttime search, we have indicated that probable cause for a nighttime search exists upon a showing that the evidence sought may be quickly and easily disposed of, and we have taken judicial notice that drugs are such evidence.

Knudson, 499 N.W.2d at 875 (citations omitted). To the extent our prior decisions approved a per-se rule justifying the issuance of nighttime warrants in drug cases, they are overruled. See Herrick, 1997 ND 155, ¶ 21, 567 N.W.2d 336. “Merely alleging the presence of marijuana and methamphetamine does not allow one to infer the drugs were easily disposable.” State v. Utvick, 2004 ND 36, ¶ 21, 675 N.W.2d 387. An officer must set forth some facts for believing the evidence will be destroyed other than its mere existence. See Herrick, at ¶ 23.

Fields, 2005 at ¶¶ 10-11 (Internal parentheticals omitted).

[¶ 54] Although the Fields Court cited examples of cases where nighttime drug dealing was used to justify nighttime search warrants that rationale does not apply to this case for a variety of reasons. First of all, Witte did not articulate any concern that the evidence he was looking for would disappear if he had to wait until morning to search.

(App. at 16). Perhaps he did not do so because, as he repeatedly admitted, he had no more than a generalized concern and no facts related to Zeller's case to support such a justification. (5/7/13 Tr. at 20, 23, 24). Witte specifically testified that he "had no information related to Mr. Zeller being armed, being dangerous, or specifically that showed exigent circumstances where he would destroy evidence." (5/7/13 Tr. at 30-31). Second, Witte did specifically articulate a justification for searching at night, which was for enhanced safety. (App. at 16). He claimed he needed the "cover of darkness" and not to make sure evidence did not disappear. (App. at 16). One gets the impression from reading the search warrant that if, Witte failed to obtain the warrant before daylight, he would have waited until the following night to execute the warrant to take advantage of the "cover or darkness" and enhance the safety of everyone involved. Id. Although Witte presented two reasons for nighttime execution: one within the warrant (safety) and another at the motion hearing (ensuring the evidence was not lost), his real justification was made clear during the hearing. The following exchange is illustrative:

Q And you testified at your deposition that whenever you apply for a search warrant -- you know, if you are applying for a search warrant at night you always request an opportunity to execute the warrant immediately, correct?

A Yes. If I'm staying up and I'm writing a search warrant in the middle of the night, the intention is to serve it at that time period. I'm not going to stay -- if I have probable cause I'm not going to not write it and then get up at 8:00 o'clock and write it. If I have that time and I'm writing the search warrant I'm not going to write it and then go home and go to bed. I'm going to write it, get it signed and we're going to serve it.

Q What if you don't have any specific facts indicating that the evidence you're seeking is going to disappear unless you serve it immediately?

A I don't think we -- I don't think that we need to show that the evidence is going to disappear immediately. We just need to be able to show that this is taking place outside of the normal hours of execution of a search warrant and that the investigation and activity is ongoing. I don't think we have to show that --

(5/7/13 Tr. at 18-19) (Emphasis added). Witte later explained:

In this case, it was simply a nighttime search warrant. The investigation was ongoing through the night. I had no information related to Mr. Zeller being armed, being dangerous, or specifically that showed exigent circumstances where he would destroy evidence.

However, I do have an indication that Mr. Zeller is continuing his criminal activities at night, which leads me to conclude that if he has x-amount of narcotics in his residence for sale, if he continues selling throughout the night, I have no idea what's going to be left when I execute the search warrant. Whether it be at 4:00 o'clock, 5:00 o'clock, 8:00 o'clock, 10:00 o'clock the next day. Which is the primary reason we continued through the night with this search warrant.

(5/7/13 Tr. at 31) (Emphasis added). In reality, Witte wanted to search at night because that is when he happened to receive the information. He did not want to have to go home and go to bed and then get up later to conduct the search. (5/7/13 Tr. at 18-19). He offered nothing more than fanciful and speculative concerns about how Zeller could have disposed of some the evidence he was hoping to obtain, and he did not even come up with that concern until long after the warrant was executed. (App. at 15-16; 5/7/13 Tr. at 19). Furthermore, Witte's alleged concern that Zeller might continue to sell drugs throughout the night should be considered in light of his actions. Specifically, that at best, the nighttime search prevented Zeller from disposing of evidence between 4:05 a.m. (the time of the search) and 6:00 a.m. (the time when nighttime authorization is not required) and that Witte was perfectly content to leave Zeller's home largely unmonitored between midnight and 4:00 a.m. (5/7/13 Tr. at 20). Nevertheless, even if Witte's concerns were genuine, he did not express any concern about evidence disappearing within his warrant application. When balanced against the need "to protect citizens from being subjected to the trauma of unwarranted nighttime searches," Witte's alleged concerns seem frivolous by comparison. Schmeets, 278 N.W.2d at 410 (explaining the

purpose of N.D.R.Crim.P 41(c)).

[¶ 55] Witte made no showing that Zeller was dealing drugs at night. The evidence was that Gust was dealing drugs at night because that is when Witte happened to set up the controlled buy. (App. at 15-16). That Gust may have met with Zeller afterward and may have left the money from the controlled buy at Zeller's home does not show that Zeller was dealing drugs. Furthermore, Witte's assumption that the money in question had to be in Zeller's home was questionable given Gust's stops first at a bar then at a drive-through. In any event, Witte should not have been permitted to justify the nighttime provision after the fact. Had Witte asked for the nighttime provision without expressing disingenuous concerns about safety, there is no indication that the district court judge would have permitted nighttime service.

### **CONCLUSION**

[¶ 56] For all of the foregoing reasons, Zeller asks this Court to find that the trial court erroneously denied his motions to suppress and to remand with instructions to allow Zeller to withdraw his guilty pleas.

Dated this the 11th day of December, 2013.

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**CERTIFICATE OF SERVICE**

¶ 57] A copy of this document was e-filed with the North Dakota Supreme Court and served upon Assistant Cass County State's Attorney Mark R. Boening, pursuant to Administrative Order 14 on the 20th day of December, 2013. Specifically, the Brief of Appellant was filed and served as follows:

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