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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff - Appellee, vs. Brian Alan Kuruc, Defendant - Appellant.	**SUPREME COURT NO. 20130334** Criminal No. 09-2013-CR-00095

ON APPEAL FROM CRIMINAL JUDGMENT AND
COMMITMENT, ENTERED OCTOBER 21, 2013
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
THE HONORABLE WICKHAM CORWIN, PRESIDING

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph

North Dakota Cases

Other State Cases

Federal Cases

Statutes

Other State Statutes

LAW AND ARGUMENT

I. All evidence in this case should be suppressed.

a. Law enforcement's entry into the hotel room went beyond a mere seizure and constituted an illegal search.

[¶1] The State contends law enforcement's nonconsensual, continuous, and destructive entry into the hotel room—which yielded the vast majority of evidence presented to the magistrate—was not actually a search, but was a mere "seizure" of the hotel room. This argument is fraught with errors, and misapprehends the nature of a seizure versus a search. "A seizure affects only the person's possessory interests; a search affects a person's privacy interests." Segura v. United States, 468 U.S. 769, 806 (1984). While the seizure of a premises is permissible while a warrant is secured, a warrantless search in the same timeframe is illegal. Id. at 810.

[¶2] "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113 (1984). Contrary to the State's contentions, occupants of a hotel room possess the same expectation of privacy as occupants of a home. Stoner v. California, 376 U.S. 483, 490 (1964). In this case, law enforcement consciously chose to knock on the hotel room door rather than pursue a search warrant. (Tr., 56:9-57:10). When the door was answered, Deputy Tonya Grabinger immediately entered the room. (Tr., 11:21-24). When Rebecca Larson tried to close the door and end the conversation, Deputy Grabinger blocked the door and remained in the room. (Tr., 19:6-14). Deputy Grabinger then saw Mr. Kuruc going into the bathroom with a duffel bag—an observation that would have been impossible had she not illegally entered in the first instance. (Tr., 13:21-14:1). Deputy Grabinger tried to physically stop Mr. Kuruc, destroyed the bathroom door lock, and

burst into the bathroom. (Tr., 14:23-15:19). Visual evidence from the bathroom, statements made by the occupants, and the entire sequence of events which flowed from her nonconsensual and continuous invasion of the hotel room were then used in applying for a search warrant. (Affidavit in Support of Search Warrant, Appellant's App. at 34). The State implausibly contends this unconstitutional sequence constituted a mere seizure, rather than a search.

[¶3] The State urges these illegal actions were justified to prevent evidence from being destroyed. Had the deputies not set this sequence of events in motion through their own choices, however, there would have been no impetus for any destruction of evidence. Indeed, the occupants would have had no idea law enforcement was even on the premises. Law enforcement cannot create an exigency, and then rely on exigent circumstances to justify its own actions. See City of Jamestown v. Dardis, 2000 ND 186, ¶ 18, 618 N.W.2d 495. Further, this Court has repeatedly cautioned, "an officer's mere fear or speculation that evidence might be destroyed does not justify a warrantless search and seizure under the exigent circumstances exception." State v. Canfield, 2013 ND 236, ¶ 9.

[¶4] To support its untenable position, the State cites a number of cases, all of which are inapposite. In a number of the cases, consent to enter was given, a situation indisputably not present here. See United States v. Walker, 2010 WL 3271392, at *3 (D. N.D. Aug. 17, 2010); United States v. Burrell, 2006 WL 1715608, at *21 (D. Minn. Jun. 19, 2006); State v. Tillman, 2012 S.D. 57, ¶ 2, 817 N.W.2d 812. In both Illinois v. McArthur, 531 U.S. 326, 333 (2001) and Hester v. State, 208 S.W.3d 747, 750 (Ark. 2005), law enforcement refrained from entering without consent. In State v. Fuller, 2013

WL 5777901, at *3 (Minn. Ct. App. Oct. 28, 2013), law enforcement had a basis to enter the building because it was a store open to the public, and the clerk in the store already likely knew of the police presence because of an arrest outside the store. None of the cases cited by the State contain the same combination of non-consent, continuous and warrantless invasion, destruction of property, and gathering of evidence to support a search warrant as is present here.

[¶5] The proper comparison case is State v. Gagnon, 2012 ND 198, 821 N.W.2d 373. In Gagnon, law enforcement saw marijuana plants in a house window and chose to act on this knowledge by knocking on the door. Id. at ¶ 3. When the occupants refused to give consent to enter, law enforcement declared the premises would be secured until a search warrant was obtained, and proceeded to enter the house. Id. This Court concluded law enforcement's entry and "walk-through" of the house was an unconstitutional warrantless search, unjustified by an exception, including exigent circumstances. Id. at 15. The law enforcement conduct in this case surpasses the illegal conduct recognized in Gagnon. In Gagnon, law enforcement merely walked through the house. Here, evidence from the illegal entry was used to directly support a search warrant.

b. The illegal search was not justified by the independent-source doctrine or by the inevitable-discovery doctrine.

[¶6] When considering the independent-source and inevitable-discovery doctrines, it is imperative to remember it is the State's burden to prove they apply and they obviate what is otherwise unconstitutional police conduct. In evaluating the first prong of the independent-source doctrine, it strains all believability that the magistrate did not consider the evidence gathered from the illegal entry when that evidence makes up the bulk of the search warrant affidavit. (See Affidavit in Support of Search Warrant,

Appellant's App. at 34). This stands in stark contrast to Murray v. United States, 487 U.S. 533 (1988), and State v. Winkler, 1997 ND 144, 587 N.W.2d 330, which upheld convictions following otherwise illegal searches because the subsequent warrant affidavits involved contained no information obtained during those searches. Even if the tainted information is removed from the present warrant affidavit, probable cause still does not exist. While the affidavit is replete with information regarding the detective's qualifications, it contains no information about the deputies' training or experience. Simply stating the deputies are trained and experienced is not proof of this essential fact. "An affidavit expressed in conclusions without detailing underlying information is insufficient for probable cause." State v. Rangeloff, 1998 ND 135, ¶ 19, 580 N.W.2d 592.

[¶7] Under the second prong, the State claims but does not prove the decision to seek a warrant was not motivated by observations made during the illegal entry. At best, we know Deputy Eric Swenson briefly left the hotel room to call a detective, not the magistrate. (Tr., 50:10-18). We know no details about this conversation, and the State has introduced nothing to prove that a warrant was being sought on independent grounds. The search warrant affidavit provides overwhelming evidence to the contrary, considering its extensive reliance upon evidence from the illegal search. The State has not met its burden of proving there was an independent source of discovery.

[¶8] Similarly, the State has not met its burdens under the inevitable-discovery doctrine, which as explained in the principal brief, is inapplicable in any respect. (Appellant's Brief at ¶ 19). Nonetheless, this Court recognizes a heightened standard under this doctrine, which requires the State to prove an absence of bad faith. State v.

Holly, 2013 ND 94, ¶ 58, 833 N.W.2d 15. The State's "proof" was offered in one sentence: "Deputy Grabinger's actions were not made in bad faith, nor were they made in order to gather evidence under the guise of inevitable discovery." (Appellee's Brief at ¶ 52). Stating there was no bad faith is not proof, and it certainly does not meet the State's burden. Law enforcement's actions accelerated the discovery of evidence, and the State has failed to prove an absence of bad faith and how evidence would otherwise have been discovered. See State v. Smith, 2005 ND 21, 691 N.W.2d 203. Because the State has not met its burdens, the inevitable-discovery doctrine cannot be employed to salvage the illegal entry.

II. Lawful possession of a controlled substance under N.D.C.C. § 19-03.1-23(7) is a meritorious defense to the charges.

[¶9] The State argues Mr. Kuruc's medical marijuana order cannot be used in his defense by employing a strained and convoluted parsing and combining of statutes. None of this is necessary. This question can be—and must be—resolved under the plain, unambiguous language of N.D.C.C. § 19-03.1-23(7):

> It is unlawful for any person to willfully . . . possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this chapter. . . .

(emphasis added). Contrary to the government's claim, the plain language reflects there is no schedule restriction in the statute. There is no discussion in the statute about whether North Dakota recognizes a medical use for marijuana. The statute does not impose a residency requirement for the prescribing practitioner. Lawful possession in this case is established under the provisions actually present in the North Dakota statute, and there is no need to give full faith and credit to any other state's laws. Section 19-

03.1-23(7) alone plainly and unambiguously provides that a person may possess a controlled substance if it was obtained pursuant to a valid prescription or order of a practitioner in the course of the practitioner's professional practice.

[¶10] The State's arguments and the district court's rationale impermissibly read in additional restrictions and language. If such restrictions were intended, the Legislature would have included them in the Uniform Controlled Substances Act. See Simon v. Simon, 2006 ND 29, ¶ 17, 709 N.W.2d 4 ("[i]t must be presumed that the Legislature intended all that it said, and that it said all that it intended to say."). As the State aptly points out, the Legislature has commanded that a uniform law "must be so construed so as to effectuate its general purpose to make uniform the law of those states which enact it." N.D.C.C. § 1-02-13 (emphasis added). Applying this Legislative command, this Court must recognize that Nebraska and Wyoming were aware that their respective uniform counterparts to N.D.C.C. § 19-03.1-23(7) allowed for legal possession of marijuana with a practitioner's order, and therefore amended these otherwise-identical statutes to explicitly exclude marijuana from legal possession. See Neb. Rev. Stat. § 28-416(3); Wyo. Stat. § 35-7-1031(c). Because the North Dakota Legislature has made no similar amendments to the uniform law, marijuana possession is legal with a practitioner's order under N.D.C.C. § 19-03.1-23(7).

[¶11] The State contends the "crux of this case . . . rests upon the lack of a recognized medicinal use" of marijuana in North Dakota. (Appellee's Brief at ¶ 59). This is wrong. The crux of this case is what the statute plainly provides. The State, and the district court, have created an ambiguity in an unambiguous statute, and impermissibly resolved it against Mr. Kuruc. The statute, by its own words, permits Mr. Kuruc's possession of a

controlled substance with a practitioner's order, and accordingly, he must be allowed to introduce this legal possession as a defense to the charges.

Respectfully submitted January 22, 2014.

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IN SUPREME COURT
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State of North Dakota, Appellee, v. Brian Alan Kuruc, Appellant.	Supreme Court No. 20130334 District Court No. 09-2013-CR-00095 **CERTIFICATE OF ELECTRONIC SERVICE**

[¶1]I hereby certify that on January 22, 2014, the following documents:

APPELLANT'S REPLY BRIEF

were e-mailed to the address below and are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail:

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Dated: January 22, 2014

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