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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 BRIEF

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[¶1] Whether the district court erred by denying in part a motion to suppress evidence on the basis that law enforcement's discovery of evidence after a warrantless and nonconsensual entry into a hotel room was admissible under the inevitable-discovery and independent-source doctrines.

[¶2] Whether the district court erred by denying a motion in limine seeking an order that possession of a controlled substance in accordance with a valid prescription or order was admissible at trial, and appropriate jury instructions regarding this lawful possession, on the basis that marijuana is a schedule I controlled substance and a valid prescription or order would not negate the charge of Possession with Intent to Deliver.

STATEMENT OF THE CASE

[¶3] Brian Kuruc appeals from the criminal judgment and commitment entered by the Cass County District Court. (Criminal Judgment and Commitment, Appellant's App. at 21). Judgment was entered after Mr. Kuruc pled guilty to: 1) Possession of a Controlled Substance with Intent to Deliver; 2) Tampering with Physical Evidence; and 3) Possession of Marijuana Paraphernalia. (Conditional Guilty Plea, Appellant's App. at 20). Mr. Kuruc reserved the right to appeal the district court's orders on two separate pretrial motions: 1) a motion to suppress evidence gathered as a result of an illegal search by law enforcement; and 2) a motion in limine seeking a pretrial order that evidence of a prescription for marijuana would be admissible as a defense to the crimes charged and for jury instructions reflecting the same. In January 2013, Mr. Kuruc rented a hotel room in Casselton, North Dakota. Law enforcement forcibly entered the room without consent and without a warrant. (Transcript, Hearing on Motion to Suppress, pp. 19-24). Incriminating statements and physical evidence were gathered and used as the basis for a subsequently-acquired search warrant. (Affidavit in Support of Search Warrant, Appellant's App. at 34). The district court suppressed verbal statements and physical evidence gathered from a rental car, but declined to suppress physical evidence from the hotel room and any other evidence under the inevitable-discovery and independent-source doctrines. (Memorandum Opinion and Order, Appellant's App. at 8). The district court also refused to allow evidence of Mr. Kuruc's marijuana authorization order to be used as a defense to the charges. (Memorandum Opinion, Appellant's App. at 17). Following his conditional guilty plea, Mr. Kuruc appeals. (Notice of Appeal, Appellant's App. at 28).

STATEMENT OF THE FACTS

[¶4] On January 9, 2013, Mr. Kuruc and his fiancée, Rebecca Larson, were staying at the Days Inn in Casselton, North Dakota. (Tr., 69:8-70:2). At approximately 10:30 a.m., Cass County Sheriff's Deputies Tonya Grabinger and Eric Swenson responded to a reported smell of marijuana coming from the room occupied by Mr. Kuruc and Ms. Larson. (Tr., 8:6-23). When they arrived, the deputies also smelled marijuana. (Tr., 9:1-6; 54:18-20). The deputies learned Mr. Kuruc and Ms. Larson had apparently come from out-of-state, more people had joined them in the room, and checkout was scheduled to occur at approximately 1:00 p.m. (Tr., 10:5-12). This was the entirety of the evidence available to the deputies prior to making any contact with the room's occupants.

[¶5] The deputies considered applying for a warrant, while watching the hotel room door in the event the occupants started to leave during the two-and-a-half hour timeframe. (Tr., 35:20-23). They also considered knocking on the door and attempting to gain consent to enter. (Tr., 23:21-24:4). Ultimately, the deputies elected to forego applying for a warrant, and instead chose to contact the occupants directly. (Tr., 56:9-12).

[¶6] With both officers present, Deputy Grabinger knocked on the door, which Ms. Larson answered. (Tr., 11:5-6). Deputy Grabinger testified that after Ms. Larson opened the door, "I stepped into the threshold of the doorway and I had asked Ms. Larson if we could come in and speak about the marijuana complaint. She stated that I could not." (Tr., 11:21-24). Ms. Larson attempted to shut the door and end the conversation, but Deputy Grabinger maintained her presence in the hotel room by putting her foot in the door to prevent it from closing. (Tr., 19:6-14). While inside the room, Deputy Grabinger continued to unsuccessfully seek consent to search further. (Tr., 12:3-13:4). After this

consent was repeatedly denied, the deputies finally began the process of applying for a search warrant. (Tr., 13:4-6).

[¶7] Before a search warrant was ever issued, however, the deputies collected the bulk of the evidence that formed the basis of Mr. Kuruc's conviction. While Deputy Grabinger remained in the hotel room, refusing to let the door close, Ms. Larson stated she "might have smoked marijuana" earlier in her car, but she possessed a medical authorization order for marijuana from the State of Washington. (Tr., 12:12-17). As Deputy Grabinger continued to question Ms. Larson, Mr. Kuruc went into the bathroom with a duffel bag. (Tr., 13:25-14-13). Deputy Grabinger instructed Mr. Kuruc not to go into the bathroom, and then went further into the hotel room to try "to block Mr. Kuruc so he could not shut the door . . . ." (Tr., 14:23-25). Once Mr. Kuruc entered the bathroom and refused to come out, Deputy Grabinger broke the lock on the bathroom door and removed Mr. Kuruc and the other occupants from the hotel room. (Tr. 15:10-16:3). Deputy Grabinger testified there was a powerful marijuana odor in the bathroom and an empty baggie, Mr. Kuruc's arms were wet, and he admitted that he was attempting to "get rid of" marijuana. (Tr. 16:5-17-8).

[¶8] At this point, a search warrant application still had not been prepared. Detective Joseph Gress prepared the eventual search warrant application, including an affidavit in support. (Search Warrant Application, Appellant's App. at 29). In his affidavit, Detective Gress relied extensively on the observations made by the deputies during their warrantless and nonconsensual search, including the incriminating statements made by Ms. Larson about her marijuana use and the presence of evidence in the rental car. (Affidavit in Support of Search Warrant, Appellant's App. at 34). He also explained in

detail the events involving Deputy Grabinger entering the hotel room, breaking the lock on the bathroom door, observing the scene inside, and receiving incriminating statements from Mr. Kuruc about "trying to get rid of" evidence. (Id.). Despite the deputies' significant delay in submitting an application, a warrant was issued at 12:51 p.m.—fewer than two hours after the deputies' initial arrival, and before the scheduled checkout time. (Tr. 61:23-62:2). Ms. Larson attempted to show that she and Mr. Kuruc possessed marijuana legally under the medical orders of a Washington doctor, but this evidence was disregarded while law enforcement gathered physical evidence from the hotel room and the rental car. (Tr. 27:24-28:13).

[¶9] Mr. Kuruc and Ms. Larson moved to suppress all evidence gathered on the basis of law enforcement's illegal warrantless and nonconsensual entry and search of the hotel room. The district court concluded that the physical evidence from the rental car and the incriminating statements must be suppressed, but that the remaining physical evidence from the hotel room was admissible under the inevitable-discovery and independent-source doctrines. (Memorandum Opinion and Order, Appellant's App. at 8). Mr. Kuruc and Ms. Larson also unsuccessfully moved for a pretrial determination that their medical marijuana authorization orders from the State of Washington could be introduced to rebut the charges. (Memorandum Opinion, Appellant's App. at 17). Following these denials, Mr. Kuruc conditionally pled guilty to the charges and now appeals.

LAW AND ARGUMENT

I. All evidence in this case should be suppressed.

[¶10] The district court properly suppressed the verbal statements given and the physical evidence gathered from the rental car. This evidence was obtained as a direct result of a warrantless and nonconsensual search in violation of the Fourth Amendment,

and therefore, suppression was appropriately ordered. See State v. Nickel, 2013 ND 155, ¶ 22, 836 N.W.2d 405 (unless an exception applies, evidence must be suppressed from a warrantless search). The district court incorrectly determined, however, that the physical evidence discovered in the hotel room survived the Fourth Amendment violation through the inevitable-discovery and independent-source doctrines. Because the district court's application of law to the facts of the case is being challenged, this Court fully reviews the district court's conclusions. See State v. Johnson, 2009 ND 167, ¶ 6, 772 N.W.2d 591. The standard of review employed when considering a district court's decision on a motion to suppress is well-established:

> This Court defers to the district court's findings of fact and resolves conflicts in testimony in favor of affirmance. This Court will affirm a district court decision regarding a motion to suppress if there is sufficient competent evidence fairly capable of supporting the district court's findings, and the decision is not contrary to the manifest weight of the evidence. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law.

Id.

a. Law enforcement's entry was illegal.

[¶11] Physical entry into the home is the "chief evil against which the Fourth Amendment protects." Payton v. New York, 445 U.S. 573, 586 (1980). Accordingly, warrantless entries are presumptively unreasonable for purposes of a Fourth Amendment inquiry. Id.; State v. Keilen, 2002 ND 133, ¶ 11, 649 N.W.2d 224. This means that all evidence directly and indirectly obtained from an illegal search must be suppressed. State v. Linghor, 2004 ND 224, ¶ 4, 690 N.W.2d 201. "In suppression cases, the defendant has the initial burden of establishing a prima facie case of illegal seizure before the burden of persuasion shifts to the prosecution to justify its actions." City of Jamestown v. Snellman, 1999 ND 200, ¶ 6, 586 N.W.2d 494 (citing City of Fargo v.

Sivertson, 1997 ND 204, ¶ 6, 571 N.W.2d 137, 139; State v. Glaesman, 545 N.W.2d 178, 182 n. 1 (N.D. 1996)).

[¶12] Law enforcement had no legitimate basis to enter the hotel room, a sanctuary which carries the same impenetrable protections as one's home. See Stoner v. California, 376 U.S. 483, 490 (1964) ("No less than a tenant of a house, or the occupant of a room in a boarding house, . . . a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures") (citations omitted). Permission to enter was not given by the occupants. (Memorandum Opinion and Order; Appellant's App. at 11); (Tr., 12:3-13:4). No warrant had been issued either, but the deputies, unsatisfied with the lack of consent, entered the room to block the door from closing so they could maintain contact with the occupants. See Kyllo v. United States, 533 U.S. 27, 37 (2001) (any physical invasion of the structure of the home, by even a fraction of an inch, is too much); State v. Maland, 103 P.3d 430, 435 (Idaho 2004) (describing officer's actions of placing his foot in the door as a forcible entry). Further, still no warrant had been issued when law enforcement broke the lock on the bathroom door, and directly gathered evidence as well as information to support the application for a search warrant.

[¶13] The State carries the burden of demonstrating why the evidence gathered during and after the illegal entry of the hotel room should not be suppressed. Snellman, 1999 ND 200, ¶ 6, 586 N.W.2d 494. The district court concluded the State did not meet its burden with respect to the verbal statements given and physical evidence retrieved from the rental car. "Clearly any incriminating statements made before the warrant was issued must be excluded. Evidence found in the rental car should also be excluded as it was only because of one of those statements that this vehicle came to the officers' attention."

(Memorandum Opinion and Order, Appellant's App. at 13). This Court should reach the same conclusion and affirm this portion of the district court's order. Because the verbal statements given by the occupants were coerced through an illegal entry, these statements were correctly suppressed. Kitchen, 1997 ND 241, ¶ 9, 572 N.W.2d 106. Similarly, because physical evidence from the rental car was obtained as a result of those illegally-coerced statements, this evidence was correctly suppressed as well. "Evidence subsequently gained as a result of the initial illegally acquired evidence is 'fruit of the poisonous tree' and must be suppressed, unless an exception to the warrant requirement exists." Keilen, 2002 ND 133, ¶ 12, 649 N.W.2d 224.

[¶14] The "fruit of the poisonous tree" analysis also applies to the physical evidence gathered from the hotel room. As with the evidence in the rental car, this evidence was collected as a result of information obtained from the illegal search. At the evidentiary hearing, the State acknowledged that if the search was deemed to be illegal, there was no evidence that could be salvaged as a result:

> THE COURT: [I]f I conclude that the critical misstep was when Deputy Grabinger stepped across the threshold. Right – you know, the very first thing that happens after the knock. If everything that follows gets thrown out, what do you have left?
>
> MS. SCHMITZ OLSON: I don't think we have anything left, Your Honor.

(Tr. 84:21-85:3). Even after this concession, however, the district court independently concluded that the taint of the illegal search was removed under the inevitable-discovery and independent-source doctrines. This conclusion was wrong.

b. The physical evidence from the hotel room is not admissible under the inevitable-discovery doctrine.

[¶15] Under the inevitable-discovery doctrine, evidence derived from information obtained in an illegal search is admissible under the "fruit of the poisonous tree" analysis

if it would have otherwise been discovered without the unlawful conduct. State v. Smith, 2005 ND 21, ¶ 31, 691 N.W.2d 203. This Court employs a two-part test in analyzing the inevitable-discovery doctrine:

> First, use of the doctrine is permitted only when the police have not acted in bad faith to accelerate the discovery of the evidence in question. Second, the State must prove that the evidence would have been found without the unlawful activity and must show how the discovery of the evidence would have occurred. . . . A showing that discovery might have occurred is entirely inadequate.

Id. (quoting State v. Handtmann, 437 N.W.2d 830, 837-38 (N.D. 1989)). The two-part test was adopted to ensure law enforcement resists the temptation to use shortcuts in evidence gathering under the alleged authority of the inevitable-discovery doctrine. State v. Holly, 2013 ND 94, ¶ 54, 833 N.W.2d 15. This test, with the prohibition on bad faith, offers greater protection under the North Dakota Constitution than is afforded under the United States Constitution. State v. Johnson, 531 N.W.2d 275, 278-79 (N.D. 1995).

[¶16] The first part of the inevitable-discovery test bars law enforcement from acting in bad faith to accelerate the discovery of evidence. Holly, 2013 ND 94, ¶ 56, 833 N.W.2d 15. "Bad faith" is equated with law enforcement's knowing or intentional violation of an accused's rights. Id. at ¶¶ 57-58. Under the Fourth Amendment, individuals have a constitutional right to be free from warrantless, nonconsensual searches, yet the deputies invaded the hotel room against the occupants' wishes, culminating in the gathering of physical evidence and information. (Tr., 11:21-16:10). The State has the burden to prove an absence of bad faith. Holly at ¶ 58. The only argument conceivably explaining the deputies' actions is that exigent circumstances justified the illegal entry, but this contention was soundly and properly rejected by the district court. (Memorandum Opinion and Order, Appellant's App. at 12) ("Because there were no exigent

circumstances, the warrantless entry into the hotel room was unreasonable."). There is no objective evidence to overcome the presumption of bad faith attached to the warrantless, illegal, and destructive actions by law enforcement in this case. Under the heightened protections offered under the North Dakota Constitution, the State cannot meet its burden.

[¶17] In addition to trampling on the occupants' rights, the illegal entry into the hotel room accelerated the gathering of evidence. By entering the hotel room, law enforcement was able to immediately gather not only direct evidence, but information which formed the basis for the eventual search warrant application. "When a shortcut is taken that circumvents the requirements of the Fourth Amendment, the requirements of the inevitable-discovery doctrine have not been met." Holly, 2013 ND 94, ¶ 55, 833 N.W.2d 15. Simply put, the deputies consciously chose a shortcut, rather than seeking a warrant, and greatly accelerated the pace at which evidence was obtained.

[¶18] The second part of the inevitable-discovery test places the burden on the State to show that the evidence would have been found without the illegal activity and how that would have occurred. Smith, 2005 ND 21, ¶ 31, 691 N.W.2d 203 (quoting Handtmann, 437 N.W.2d 830, 838 (N.D. 1989)). "It is well established that illegally obtained evidence cannot be used to establish probable cause to issue a search warrant." State v. Fields, 2005 ND 15, ¶ 6, 691 N.W.2d 233. The deputies considered applying for a warrant prior to entering the room illegally, but deliberately chose not to do so. (Tr., 23:21-24:1). Instead, they gathered evidence and information in an illegal search that was used to support the eventual search warrant application. (Affidavit in Support of Search Warrant, Appellant's App. at 34). Because the warrant application was

overwhelmingly based on the illegally-obtained information, the State cannot show how any evidence would have otherwise been discovered.

[¶19] Finally, the inevitable-discovery doctrine is inapplicable to the physical evidence from the hotel room in any respect. "The inevitable discovery doctrine applies where evidence is not actually discovered by lawful means, but inevitably would have been. Its focus is on what would have happened if the illegal search had not aborted the lawful method of discovery." State v. Winkler, 552 N.W.2d 347, 354 n.4 (N.D. 1996) (quoting United States v. Markling, 7 F.3d 1309, 1318 n.1 (7th Cir. 1993)); accord State v. Gregg, 2000 ND 154, ¶ 51, 615 N.W.2d 515 (inevitable-discovery doctrine applies to evidence not actually found by lawful means, but inevitably would have been found). Following the illegal search, law enforcement actually collected the physical evidence from the hotel room under the authority of the subsequently-issued search warrant. Because this evidence was gathered under the lawful authority of a search warrant, the district court's reliance on the inevitable-discovery doctrine is misplaced, and instead, the independent-source doctrine provides the proper legal context. "The independent source doctrine . . . applies when the evidence has actually been discovered by lawful means. Its focus is on what actually happened—was the discovery tainted by the illegal search?" Id. Even under the independent-source doctrine, the State still cannot prove an exception applies to the illegality of the warrantless search.

c. The physical evidence from the hotel room is not admissible under the independent-source doctrine.

[¶20] "The independent-source exception allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." Gregg, 2000 ND 154, ¶ 52, 615 N.W.2d 515. The independent-source doctrine was discussed at

length in Murray v. United States, 487 U.S. 533 (1988), with the United States Supreme Court noting that the correct employment of this doctrine should place law enforcement in the same, not a worse, position than if no error or misconduct had occurred. Id. at 537. The Supreme Court noted that for a source to be truly independent, information gathered during the illegal search could not underlie a subsequently-issued warrant.

> The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

Id. at 542. The majority further clarified that "what counts is whether the actual illegal search had any effect in producing the warrant . . . ." Id. at 542 n.3. This Court has adopted this rationale in employing a two-step analysis. Step one requires that the warrant be supported by probable cause derived from sources independent of the illegal search, and step two requires that the decision to seek the warrant was not prompted by observations made during the illegal search. Gregg at ¶ 54.

[¶21] In Murray, the Supreme Court upheld the seizure of evidence from a warehouse despite an initial illegal entry by law enforcement because the search warrant application contained no information derived from that search. Murray, 487 U.S. at 543. In this case, the search warrant application is replete with information gathered during the illegal entry into the hotel room, including information that the district court explicitly concluded had to be suppressed. In the affidavit in support of the search warrant application, Detective Gress noted, in part:

> Rebecca [Larson] would not consent to a search of the room, however told deputies that Rebecca did have a medical marijuana card and that Rebecca did have marijuana in a Hertz rental vehicle that Rebecca had rented.

. . .

> Kurec [sic] went into the bathroom with a bag and said that Kurec was going to brush Kurec's teeth. Deputy Grabinger attempted to keep the door open while Kurec brushed Kurec's teeth but was blocked by Larson. Deputy Grabinger heard the water running and Deputy Grabinger stated that there was an overpowering odor of what Deputy Grabinger knows through Deputy Grabinger's training and experience as a police officer to be the odor of marijuana. Deputy Grabinger then order [sic] Kurec to open the door or the door would be breached. Kurec didn't open the door and Deputy Grabinger breached entry. Deputy Swenson handcuffed Kurec and stated that Kurec's arms were wet and appeared to have what Deputy Swenson knows through Deputy Swenson's training and experience as a police officer to be marijuana on Kurec's arms. Deputy Swenson asked Kurec what Kurec was doing and Kurec replied what do you think I'm doing . . . I was trying to get rid of it.

(Affidavit in Support of Search Warrant, Appellant's App. at 34). Far surpassing the mere "effect" on a search warrant condemned in Murray, the information submitted to the magistrate was so pervasively tainted by the illegal entry that the resulting warrant cannot plausibly be found to have been issued on independent grounds. As one example, the error in the district court's reasoning is evident when it concluded that Ms. Larson's statements had to be suppressed, yet, these same statements were used to obtain the search warrant. In contravention of Murray and Gregg, illegally obtained information was extensively used to obtain the search warrant, and therefore State cannot meet either step of the independent-source test. Accordingly, this doctrine cannot salvage the physical evidence from the hotel room as fruit of the poisonous tree.

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

[¶22] Mr. Kuruc additionally moved for a court order declaring that his medical marijuana authorization order from Washington was admissible as a defense to the State's charges, and for jury instructions reflecting the same. The district court denied this motion on two grounds: 1.) As a schedule I controlled substance, marijuana

possession cannot be exempted under N.D.C.C. § 19-03.1-23(7); and 2.) The charge of Possession with Intent to Deliver cannot be negated by evidence of a lawful prescription or order. (Memorandum Opinion, Appellant's App. at 17-18). These conclusions misinterpret the Uniform Controlled Substances Act, and deprive Mr. Kuruc of an essential defense.

[¶23] This Court reviews a district court's ruling on a motion in limine under the abuse of discretion standard. State v. Lutz, 2012 ND 156, ¶ 3, 820 N.W.2d 111. "A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner or if it misinterprets or misapplies the law." Id. Failure to give a jury instruction on an essential question of law is obvious error and will be reversed for abuse of discretion. See State v. Kraft, 413 N.W.2d 303, 305 (N.D. 1987).

[¶24] Mr. Kuruc possesses an order issued by a licensed neuropathic doctor in the State of Washington, authorizing him to possess up to 24 ounces of usable cannabis and 15 cannabis plants. (Medical Authorization Order, Appellant's App. at 16). This medical order establishes the defense of lawful possession under N.D.C.C. § 19-03.1-23(7) and negates the government's claim that the amount possessed evidenced an "intent to deliver." Section 19-03.1-23(7), N.D.C.C, provides in pertinent part:

> 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. . . .

Accordingly, this Court has proclaimed that "[a] defendant may not be charged with possession of a controlled substance if he has 'a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice.'" Holly, 2013 ND 94, ¶ 65, 833 N.W.2d 15 (quoting N.D.C.C. § 19-03.1-23(7)). The defendant

bears the burden of proving exemption or exception exists. See N.D.C.C. § 19-03.1-37(1) and (2); see also, Holly, at ¶¶ 65-66. By introducing the authorization order from a licensed doctor in the course of his professional practice, Mr. Kuruc has proven that he meets the statutory exemption, and that he legally possessed marijuana.

[¶25] The district court concluded that controlled substances in schedule I cannot qualify for the exemption. This conclusion is erroneous, because N.D.C.C. § 19-03.1-23(7) does not contain any schedule limitation. The statute by its own words permits a person to possess a controlled substance as long as it was obtained "pursuant to a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice." Id. "Words used in any statute are to be understood in their ordinary sense unless a contrary intention plainly appears . . . ." N.D.C.C. § 1-02-02. The district court used a strained policy argument, relying on other statutes in an attempt to add words and limitations that the Legislature did not find fit to add itself. In construing a statute,"[i]t must be presumed that the Legislature intended all that it said, and that it said all that it intended to say." Simon v. Simon, 2006 ND 29, ¶ 17, 709 N.W.2d 4 (quoting Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993)).

[¶26] It is instructive to note that in adopting the Uniform Controlled Substances Act, the Nebraska Legislature found it necessary to include a specific prohibition on marijuana in its sister statute to N.D.C.C. § 19-03.1-23(7):

> A person knowingly or intentionally possessing a controlled substance, except marijuana . . . unless such substance was obtained directly or pursuant to a medical order issued by a practitioner authorized to prescribe while acting in the course of his or her professional practice, or except as otherwise authorized by the act, shall be guilty of a Class IV felony.

Neb. Rev. Stat. § 28-416(3) (emphasis added). The Nebraska Legislature's actions reflect the understanding that the Uniform Controlled Substances Act permits the

possession of marijuana with a doctor's prescription or order. With this in mind, the Nebraska Legislature took the purposeful step of amending its adoption of the Act to explicitly prohibit the lawful possession of marijuana even with the order of a practitioner. The North Dakota Legislature has not taken similar action. Under N.D.C.C. § 19-03.1-23(7), possession of marijuana remains legal if prescribed or ordered by a practitioner.

[¶27] The district court also myopically interpreted the "valid prescription or order" requirement. The court reasoned that because N.D.C.C. §§ 19-03.1-22.4(1)(e) and 19-02.1-15.1(1)(f) define a "valid prescription" as one used for a valid medical purpose, a prescription cannot be issued for a controlled substance in schedule I under N.D.C.C. § 19-03.1-05(5)(h). While the statutes cited by the district court define a "valid prescription", N.D.C.C. § 19-03.1-23(7) does not. "When a legislature . . . places a particular provision in one place and omits it in another, it is presumed the provision does not apply where it is omitted." Tibor v. Tibor, 2001 ND 43, ¶ 46, 623 N.W.2d 12 (Sandstrom, J., dissenting) (citing 73 Am. Jur. 2d Statutes § 235). Accordingly, the district court's reliance on the extraneous definitions of a "valid prescription" was misplaced.

[¶28] Two further flaws exist in the district court's analysis. First, the district court's order focuses on whether North Dakota recognizes a medical use for marijuana. Section 19-03.1-23(7), N.D.C.C., solely requires a "valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice" with no mention of a schedule or geographical limitation. Under the statute's plain language, it makes no difference that the order was validly issued in Washington, and not North Dakota, and

thus the order is admissible as a defense to the charges. Second, the "prescription or order" requirement is disjunctive, meaning that either a valid prescription or order suffices to establish a lawful basis for possession. Even though the district court erroneously concluded there could be no valid prescription, there was a valid authorization order issued by a practitioner in the course of his professional practice in his home state.

[¶29] Emerging case law underscores the district court's error. In Lindsey v. Wyatt, 2013 WL 2319324 (D. Or. May 27, 2013), the United States District Court for the District of Oregon addressed Or. Rev. Stat. § 475.752(3), which has relevant language identical to N.D.C.C. § 19-03.1-23(7)[1]. The court endorsed the very same proposition submitted in this case: "Intentional or knowing possession of one ounce or more of marijuana is a Class B felony unless the substance was obtained pursuant to a 'valid prescription or order of a practitioner[.]" Wyatt, 2013 WL 2319324 at *5 (quoting Or. Rev. Stat. § 475.752(3)). Because North Dakota's statute is identical to Oregon's, this Court should reach the same conclusion as the Oregon federal court.

[¶30] Similarly, in Burns v. State, 2011 WY 5, 246 P.3d 283, a defendant attempted to use his medical marijuana card from Colorado as a defense to a marijuana possession charge. Id. at ¶ 4. In addressing this defense, the Wyoming Supreme Court considered Wyoming's sister statute to N.D.C.C. § 19-03.1-23(7), noting it is "unlawful in Wyoming to possess marijuana 'unless the substance was obtained directly from, or pursuant to a

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1 "It is unlawful for any person knowingly or intentionally to 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 professional practice . . . ." Or. Rev. Stat. § 475.752(3).

valid prescription or order of a practitioner while acting in the course of his professional practice.'" Id. at ¶ 10 (quoting Wyo. Stat. Ann. § 35-7-1031(c)). The court concluded that under Colorado law, the choice to seek a medical marijuana card ultimately rested with the patient following a doctor's approval, and therefore, the receipt of marijuana was not directly "prescribed" or "ordered" by a doctor. Id. at ¶ 11. Conversely, the Washington statute applicable to this case, Wash. Rev. Code § 69.51A.005, makes clear that marijuana use must be directly authorized by a professional, as reflected in the medical authorization order. Under the authority of Washington law, a licensed practitioner specifically recommended that Mr. Kuruc possess up to 24 ounces of usable cannabis and up to 15 cannabis plants for therapeutic use. (Medical Authorization Order, Appellant's App. at 16). Accordingly, the defect found in Burns is not present here.

[¶31] In Town of Grand Chute v. Kettner, 2010 WI App 71, 325 Wis.2d 403, the Wisconsin Court of Appeals considered whether medical authorization for use of marijuana from a California doctor could be used as a defense to a possession charge under Wisconsin state law. The court concluded that the case ultimately turned on a city ordinance, but did also consider the argument that possession of a controlled substance pursuant to a valid prescription or order from a practitioner was exempt under Wis. Stat. § 961.41(3g) in Wisconsin's Uniform Controlled Substances Act. Id. at ¶¶ 10-12. The court concluded the California authorization order could not be used as a defense under Wisconsin's sister statute to N.D.C.C. § 19-03.1-23(7), but only because Wisconsin's adoption of the Act specifically restricts the definition of a "practitioner" to a physician licensed in Wisconsin under Wis. Stat. § 961.01(19)(a). Id. at ¶ 10. The definition of a "practitioner" under N.D.C.C. § 19-03.1-01(25)(a) contains no similar in-state restriction:

a practitioner is a "physician . . . or other person . . . licensed, registered, or otherwise permitted by the jurisdiction in which the individual is practicing . . . to distribute . . . a controlled substance in the course of professional practice or research." Under the North Dakota statute, unlike in Kettner, the present medical authorization order from a licensed doctor is a valid defense to the charges.

[¶32] Finally, the district court abused its discretion by concluding that the possession exemption under N.D.C.C. § 19-03.1-23(7) would be of no aid in defending against a charge of Possession with Intent to Deliver. (Memorandum Opinion, Appellant's App. at 19). Mr. Kuruc's marijuana authorization order allows him to possess up to 24 ounces of usable cannabis and up to 15 cannabis plants. (Medical Authorization Order, Appellant's App. at 16). Therefore, the prescribed quantities are extremely relevant in evaluating the marijuana in Kuruc's possession in terms of whether he possessed a quantity evidencing an intent to sell, versus a quantity intended for his own medical use according to his doctor's professional recommendation.

[¶33] In sum, the plain language of N.D.C.C. § 19-03.1-23(7) permits a person to possess a controlled substance pursuant to the valid order of a practitioner. Unlike other states, which have modified their own adaptations of the Uniform Controlled Substances Act to specifically exclude marijuana or limit a practitioner's authority, the North Dakota Legislature has not enacted these prohibitions. Rather than creating an ambiguity and resolving it against the defendant, the district court should have allowed Mr. Kuruc to present the defense authorized by law. Accordingly, the district court's order denying the motion in limine must be reversed.

CONCLUSION

[¶34] All evidence seized was obtained directly and indirectly as a result of the illegal search, and therefore, is fruit of the poisonous tree that must be suppressed. Alternatively, evidence of marijuana possession in accordance with the order of a practitioner should be admitted as a defense to the charges in this case.

Respectfully submitted December 3, 2013.

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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 December 3, 2013, the following documents:

APPELLANT'S BRIEF AND APPELLANT'S APPENDIX (PAGES APP. 1 – APP. 35

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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