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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

AUG 18 2014

State of North Dakota, )  
)  
Plaintiff/Appellee, )  
)  
vs. )  
)  
Jamie Albert Apland, )  
)  
Defendant/Appellant. )

Supreme Court No. 20140150 **STATE OF NORTH DAKOTA**

District Court No. 51-2013-CR-02552

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BRIEF OF APPELLEE

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Appeal From Judgment on Conditional Plea

In and for the County of Ward, State of North Dakota

North Central Judicial District

Honorable Todd Cresap, Judge of the District Court, Presiding

Jeremy Ensrud, ND Bar ID# 07180  
Assistant State's Attorney  
Ward County State's Attorney's Office  
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## JURISDICTIONAL STATEMENT

A timely notice of appeal has been filed. This Court has jurisdiction under N.D.R.App.P. 35(b).

## STATEMENT OF THE ISSUES

- I. Whether probable cause supported the issuance of the search warrant in this case.
- II. If probable cause did not exist, officers were acting in good faith.

## STATEMENT OF THE CASE

Jamie Albert Anfin Apland, appeals the district court's final judgment entered April 23, 2014. (Appellant's Appendix, p. 20.) Apland entered conditional guilty pleas on Counts 1-4 on April 16, 2014, following the denial of Defendant's Motion to Suppress on March 14, 2014. (App. p. 1-4; 14-18.) Notice of Appeal was filed on April 23, 2014. (App p. 23.)

The State asserts that the district court's denial of the motion to suppress was reasonable and there was probable cause to issue the search warrant. Further, if the Court finds there was not probable cause to issue the search warrant, the search should be held valid as officers acted in good faith. Therefore, the State requests the Court affirm the district court's denial of the motion to suppress and affirm the criminal judgment.

## STATEMENT OF THE FACTS

As there is no transcript filed, the statement of facts has been taken from the affidavit submitted by Officer Sandusky. (App. p. 9-13.) In late August and early September of 2013, the Ward County Narcotics Task Force (WCNTF) was able to orchestrate multiple purchases of methamphetamine from Julie James. (App. p. 9-13.) The purchases were done through a confidential informant (CI). (App. p. 9-13.) Through the course of these purchases, Officers became familiar with a cream colored Cadillac

Escalade with Colorado License Plates. (App. p. 9.) James met the Escalade to provide \$1600 in suspected drug money on one occasion. (App. p. 9.) The Escalade was parked at the residence during a controlled buy. (App. p. 10.) A Harley Davidson motorcycle with Colorado license plates was also observed at the location of one of the drug transactions. (App. p. 11.) On September 13, 2013, the CI purchased additional methamphetamine from James. (App. p. 10-12.) James was riding as a passenger in the Escalade when she met the CI. (App. p. 12.) The Escalade was followed by task force officers after James exited. (App. p. 12.) The Escalade eventually stopped at 1437 1<sup>st</sup> Street Southeast. The Harley Davidson Motorcycle with Colorado Plates was already at 1437 1<sup>st</sup> Street Southeast. (App. p. 12.) On September 30, 2013, WCNTF Officers Schoenrock, Lenertz, Huber, and Sandusky performed a trash pull at 1437 1<sup>st</sup> Street Southeast. (App. p. 12.) A torn corner of a plastic bag with a white substance was located in the trash. (App. p. 12.) Officer Sandusky field tested the white substance and it tested positive for methamphetamine. (App. p. 12.) A box for an electronic scale was also located in the trash. (App. p. 12.) The electronic scale was designed to look like a computer mouse. (App. p.12.) Officer Sandusky believed the scale to be the type commonly used in trafficking of illegal narcotics. (App. p. 12.)

Based on this information, Officer Sandusky requested a search warrant for 1437 1<sup>st</sup> St SE on September 30, 2013. The search warrant was granted by Judge McLees. The search resulted in the discovery of various illegal narcotics and paraphernalia associated with their use. Apland was charged with possession of methamphetamine, methamphetamine paraphernalia, marijuana, and marijuana paraphernalia.

#### LAW AND ARGUMENT

I. The search warrant was based on probable cause.

The standard of review for a district court's decision on a motion to suppress evidence is well established. State v. Albaugh, 2007 ND 86, ¶ 8, 732 N.W.2d 712. In reviewing a district court's decision on a motion to suppress evidence, the Court will defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. State v. Smith, 2005 ND 21, ¶ 11, 691 N.W.2d 203. A district court's decision on a motion to suppress will be affirmed if "there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence." City of Fargo v. Thompson, 520 N.W.2d 578, 581 (N.D. 1994). The standard of review recognizes the importance of the district court's opportunity to observe the witnesses and assess their credibility. State v. Mitzel, 2004 ND 157, ¶ 10, 685 N.W.2d 120. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law. Id. Whether probable cause existed in a case is a question of law. State v. Ebel, 2006 ND 212, ¶ 12, 723 N.W.2d 375. Questions of law are reviewed do novo. Sturn v. Director, N.D. Dep't. of Transp., 2009 ND 39, ¶ 7, 763 N.W.2d 515.

Probable cause is required for a search warrant under the Fourth Amendment to the United States Constitution, and Article I, Section 8 of the North Dakota Constitution. State v. Birk, 484 N.W.2d 834, 836 (N.D. 1992). "[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. Ringquist, 433 N.W.2d 207, 212 (N.D. 1988). "The task of the issuing magistrate is to make a practical, commonsense decision whether, given all the information considered together, there is a fair probability contraband or evidence of a crime will be found in a particular place." State v. Rydberg, 519 N.W.2d 306, 308 (N.D. 1994).

The district court properly concluded that probable cause existed for the issuance of the search warrant. The district court noted the following factors in determining the existence of probable cause: The Cadillac and Harley Davidson were involved in and/or associated with drug transactions, the trash pull was arranged with the City of Minot Sanitation, the trash was under constant surveillance by the drug task force team, and items of paraphernalia were found in the trash. (App. p. 16-17.)

Apland asserts the results of the trash pull should be excluded as the location of the garbage cannot be ascertained from the search warrant affidavit. The district court properly found that “the information concerning the trash pull set forth in ¶ 12 [of the search warrant affidavit] reasonably conveyed to the magistrate the location of the trash at the time it was pulled.” (App. p. 17.) The court came to this conclusion based on indication that the trash pull was arranged with the City of Minot Sanitation. Apland offers his version of Task Force Officer Sandusky’s testimony to justify his stance that the location of the trash pull was not easily identifiable. Apland does not cite to the transcript of this testimony as Apland has not provided a transcript. It is not possible to rebut this allegation without a transcript.

In light of the factors considered by the district court, the district court reasonably found that “the magistrate had more than ample probable cause to issue the search warrant herein.” (App. p. 17.) In short, sufficient evidence supported the conclusion that there was probable cause to issue the search warrant, therefore, the order of the court should be upheld.

## II. Officers were acting in good faith

Generally, evidence which is illegally seized in violation of the Fourth Amendment must be suppressed under the exclusionary rule. State v. Oien, 2006 ND

138, ¶ 8, 717 N.W.2d 593; State v. Utvick, 2004 ND 36, ¶ 26, 675 N.W.2d 387. The United State Supreme Court recognized the good faith exception in U.S. v. Leon, 468 U.S. 897, 922 (1984). The Supreme Court held evidence should not be excluded when an officer has acted in good faith upon objectively reasonable reliance on the magistrate's probable cause decision. Id. A court applying the good faith exception must decide “whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.” State v. Herrick, 1999 ND 1, ¶ 15, 588 N.W.2d 847 (quoting Leon, 468 U.S. at 922 n. 23, 104 S.Ct. 3405). The North Dakota Supreme Court has recognized four specific situations when the good faith exception does not apply because the officer's reliance on the warrant is not objectively reasonable:

- (1) When the issuing magistrate was misled by false information intentionally or negligently given by the affiant;
- (2) when the magistrate totally abandoned her judicial role and failed to act in a neutral and detached manner;
- (3) when the warrant was based on an affidavit “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable”; and
- (4) when a reasonable law enforcement officer could not rely on a facially deficient warrant.

Herrick, at ¶ 15 (citing Leon, 468 U.S., at 923). “[W]hen reviewing an officer's reliance upon a warrant, we must determine whether the underlying documents are devoid of factual support, not merely whether the facts they contain are legally sufficient.” U.S. v. McKneely, 6 F.3d 1447, 1454 (10th Cir. 1993) (internal quotation omitted).

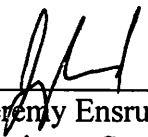
None of the four exceptions to the good faith requirement are applicable in this case. Even if the Court found the search warrant was issued without probable cause, which the State does not concede, the search would be justified under the good faith exception. A reasonably well-trained officer would believe they had probable cause to search based on the affidavit.



CONCLUSION

The State respectfully asks the Court to uphold the district court's order denying the motion to suppress. Alternatively, if the Court finds a lack of probable cause, the State requests that this Court uphold the search on the basis of the good faith exception.

Dated this 15<sup>th</sup> day of August, 2014.

  
\_\_\_\_\_  
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IN THE SUPREME COURT  
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vs. )  
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Jamie Albert Apland, ) District Court No. 51-2013-CR-02552  
)  
Defendant/Appellant. )

**AFFIDAVIT OF SERVICE BY MAIL**

LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 18 day of August, 2014, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action:

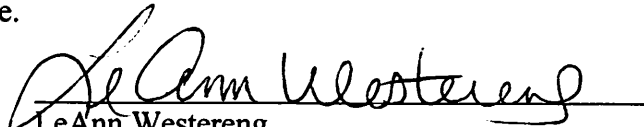
**BRIEF OF APPELLEE and  
REPLY TO THE RESPONSE TO THE MOTION TO DISMISS**

That said envelope was addressed to the following person at his address as follows:

WILLIAM S. KIRSCHNER  
ATTORNEY FOR APPELLANT  
KIRSCHNER LAW  
1351 PAGE DR S SUITE 104  
FARGO ND 58103-3536

PENNY MILLER  
CLERK OF SUPREME COURT  
JUDICIAL WING 1<sup>ST</sup> FLOOR  
600 E BLVD AVE DEPT 180  
BISMARCK ND 58505-0530

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

  
LeAnn Westereng

Subscribed and sworn before me this 18 day of August, 2014 by LeAnn Westereng.

  
Nichole Beyer  
Notary Public

