

STATE OF NORTH DAKOTA
IN THE SUPREME COURT

State of North Dakota,

Plaintiff/Appellee

v.

Jamie Albert Apland,

Defendant/Appellant

Defendant's Reply Brief

Supreme Court No. 20140150

Ward Co. No. 51- 2013-CR-02552

KIRSCHNER LAW

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ARGUMENT

1. The Standard of Review

[1] Since the issue in this case is whether or not the original affidavit submitted to the issuing magistrate was supported by probable cause, comments regarding the standard of review applicable to District Court findings of fact are inapplicable.

[2] The sole issue in this appeal, and the sole reason for the District Court's decision was the District Judge's conclusion that the affidavit for the search warrant provided probable cause for the issuance of the warrant. As noted by the State, this is a question of law, is fully reviewable on appeal, and is reviewed de novo, without any deference to the District Court's decision.

2. The transcript of the subsequent motion hearing is unnecessary to making the decision on whether probable cause existed at the time of the issuance of the search warrant.

[3] The only information before the Magistrate who issued the search warrant in this case was the affidavit of Officer Sandusky. The District Court's decision regarding this case was denial of the motion to suppress on the basis that the search warrant affidavit provided probable cause to search. Therefore, in addressing the issue of whether or not the affidavit provided "probable cause" there is no reason for this Court to consider the testimony of Officer Sandusky offered at a subsequent hearing.

[4] The State argues that if this Court finds that the original affidavit was lacking in probable cause, it should nonetheless uphold the search on the basis of the "good faith" exception to the requirement of probable cause.

[5] As this Court has noted on many occasions, it is not its role to make factual findings, but rather to review the legal decisions of the district court judges to insure that they have applied the correct law in the case.

[6] The hearing held in this case involved testimony from Officer Sandusky that was not provided to Judge McLees when he made the determination to issue the search warrant. The State claims that the testimony supports this Court in finding the “good faith” exception to “probable cause” applicable to this situation. The district court did not address the issue of good faith. It held that the underlying warrant, which depended upon the officer’s affidavit contained sufficient information to constitute “probable cause.” Instead of addressing the issue of the lack of information in the warrant affidavit regarding where and how the underlying search of the “trash” at Mr. Apland’s occurred, it involved itself in assumption and speculation so that it could uphold the search of the “garbage.”

[7] That was the specific criticism that the Minnesota Appellate Court noted in ***State v. Sand***, No. A10-629, Unpublished Opinion, dated January 4, 2011. However, despite Mr. Apland presenting this decision to the Court for consideration, the District court engaged in the same assumptions and speculations that the Minnesota District Court did in ***Sand***.

[8] The district court never addressed the issue of whether or not the “good faith” exception should apply in this case it is beyond the scope of this Court’s review for it to make factual findings without a record of the hearing being provided to it. Moreover, it is the district court’s province to make factual

findings, and under the circumstances this matter should be remanded to the district court for further proceedings.

[9] Respectfully submitted this 2nd day of September, 2014

KIRSCHNER LAW

William Steven Kirschner

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Certificate of Service

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I, William S. Kirschner, hereby certify that pursuant to Rule 25, of the North Dakota Rules of Appellate Procedure, and Administrative Order 14, that on Thursday, September 04, 2014, I sent by electronic mail a true and correct copy of the following documents:

Appellant's Reply Brief

Attorney's Certificate of Service

The copies of the electronically mailed to:

51wardsa@wardnd.com,

Which is the designated email address for the Ward County States Attorney's office.

KIRSCHNER LAW OFFICE

A handwritten signature in black ink that reads "William Steven Kirschner". The signature is written in a cursive style with a prominent initial 'W'.

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